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DELIVERY AS A PREREQUISITE TO GIFTS IN MISSISSIPPI

John H. Fox., Jr.

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Mississippi Law Journal

VOLUME XXVIII MAY, 1957 NUMBER 3

DELIVERY AS A PREREQUISITE TO GIFTS IN MISSISSIPPI

*John H. Fox, Jr.**

It would seem that any discussion of the law of gifts, in this day and time, in this or any other jurisdiction, would be pretty much "old hat", except perhaps to first year law classes in real and personal property. However, it is believed that a recent Mississippi decision,[1] and that by way of unrecognized dictum, has thrown confusion into the law of gifts, and in addition has not only perpetuated a very undesirable rule, adhered to practically nowhere in the civilized world except in Mississippi, but has also departed from a modernly accepted rule recognized in Mississippi as early as 1866.[2]

In *Raley v. Shirley* a Miss Jones died intestate. Her sole heir, under Mississippi law, was her full blood sister, a Mrs. Shirley. The decedent also had six half brothers and sisters. The decedent's estate consisted of about $10,000 in cash and about $6,000 in real estate.[3] Shortly after the funeral one of the half brothers said to Mrs. Shirley that "he thought that the deceased would want her half brothers and sisters to share in the estate." Mrs. Shirley without fraud or undue influence, "agreed orally that if they would permit her to have one-third of the estate, she would

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[1]Raley v. Shirley, 89 So. (2d) 636 (Miss. 1956).

[2]In Young v. Power, 41 Miss. 197 (1866) the court in approving the rule that "if the intention of making a gift exists, *any* language which expresses that intention is sufficient, if accompanied by an abandonment of possession and control of the subject matter of the gift to the donee", continued as follows: "This rule may be well enough with reference to gifts of *specific chattels*, but it has no application to the release of a debt existing *in parol*. This instruction and most of the others on the part of the defendant touching this point, proceed on the assumption that this was a gift of *a chattel* by parol, with delivery of possession of it to the donee; and many of the authorities cited by counsel have application to cases of that kind only. But this is manifest error. There is no such gift and no such delivery of possession; for the testatrix had nothing in her possession which she could deliver to the defendant." The court approved a requested instruction which read as follows: "To make a valid legal gift of a *debt due by parol* or open account the creditor must *in writing*, release or discharge said debt *or* do some act by which the debt is placed beyond his legal control or dominion." (Emphasis added)

[3]The nature of the assets of the estate is not mentioned in the opinion but is disclosed in appellants brief at page 5.

agree that the brothers and sisters of the half-blood could take two-thirds to be divided equally between them." All agreed that a Mrs. Raley should serve as administratrix. They employed an attorney to prepare "an instrument for the requested division of the estate." The court refers to this instrument as "an instrument in he form of an *order* for the division of the estate." Admittedly the instrument was inartificially drawn but from the previous conversations of the parties, the surrounding circumstances and a reading of the instrument, it would seem obvious that the parties were attempting to effectuate a division of the estate and that the owner of the estate realized or thought that she was making a gift to the half-blood relatives. The instrument reads as follows:

"The State of Mississippi

First District of Jones County

For and in consideration for the love and affection that I had for my sister, Miss Valera Mae Jones during her lifetime and for the love that I have and hold for her memory since she departed this life and feeling assured that if she were living she would want her half blood brothers and sisters to share her estate, I do hereby consent and agree for Mrs. W. B. Raley, the administratrix of the estate of my dead sister, the said Miss Valera Mae Jones to collect all the assets of her estate, including personal and mixed property and real estate wheresoever located and when converted into money that she divide the same as follows: One-third is to be paid to me and the other two-thirds is to be divided equally among my half brothers and sisters [naming them] share and share alike."

The instrument was signed by Mrs. Shirley and properly acknowledged before the Chancery Clerk and delivered. Shortly thereafter Mrs. Shirley caused the administratrix and all the half-blood relatives to be notified that she was the "sole owner of all the assets of the estate and that anything said or done to the contrary is null, void, and of no effect." In her pleadings she "rescinded and revoked any authority, right, or privilege conferred thereby."

The court held that this instrument was not a gift; that at most it was a consent for the administratrix to collect the assets, convert them into money and then divide; that there was no consideration for its execution; that it was not an assignment and would not constitute a gift until a distribution and delivery of at least some of the assets was made; that Mrs. Shirley could *change her mind* and revoke the instrument.

To substantiate these holdings the court then quoted from *Meyer v. Meyer*[4] the rule that to constitute a gift *inter vivos* a complete and unconditional delivery is essential. The quotation from *Meyer v. Meyer* in-

[4]106 Miss. 638, 64 So. 420 (1913).

cluded citations of five other Mississippi cases,[5] all involving gifts of specific chattels and not one single one of which had anything to do with gifts of debts or choses in action *resting in parol,* except *Young v. Power,* which it will be remembered is the very case which specifically pointed out that the rule requiring delivery had no application to gifts of choses in action resting in parol but applied only where delivery was possible in gifts of specific chattels and that a writing was effectual without delivery where no delivery was possible. Thus, the court, although citing *Young v. Power* as its authority for requiring delivery, departed from the rule announced in *Young v. Power* that no delivery was necessary in the case of choses in action resting in parol. In addition *Meyer v. Meyer* had nothing to do with the gift of a chose in action or land but merely involved the question of whether a *promise* by a donor to give a part of the estimated profits of a partnership to his sons was valid without delivery of the profits where as a bookkeeping entry he had credited them with these estimated profits on the books of the partnrship.

The only other authority cited by the court was the case of *Gidden v. Gidden,*[6] from which is quoted a statement in Thornton on Gifts and Advancements page 173 that Mississippi is the only state holding that the delivery to the donee of a deed of gift is not sufficient alone to convey title. Again in this case the subject matter involved was specific chattels (cotton) and Thornton's discussion was concerning specific chattels and not choses in action incapable of delivery.

Parenthetically it must be noted that in the *Gidden* case the court stated, and repeated in *Haley v. Shirley,* that whether its rule that a deed of gift is not sufficient to transfer title "be true or not, and whether the rule in this state be good or bad according to reason" it ought not to be changed now, and continued to throw its arm of protection around what it termed an "Indian giver". It is respectfully submitted that if the proper function of an appellate court is not to throw out previously declared untrue and bad judicial decisions and to interpret law in the light of reason, it is difficult to understand what its function is, and it would not be surprising to find protection afforded to "Indian givers", who in my day were and still are classified at best as ungentlemanly fellows. Whence comes this exaggerated idea of stare decisis? If our "sacred forefathers" had been equally timid we would still be operating under the system of trial by battle or ordeal! One of the brightest stars in the firmament known as Common Law was the ability of its judges to effectuate change where truth, goodness, and reason pointed to the change. Surely if we are the only jurisdiction in the so-called civilized

[5]Thompson v. Thompson, 2 How. 737 (1838); Wheatley v. Abbott, 32 Miss. 343 (1856); Conner v. Hull, 36 Miss. 424 (1858); Young v. Power, 41 Miss. 197 (1866); Carradine v. Collins, 7 Smedes & M. 428 (Miss. 1846).

[6]176 Miss. 98, 167 So. 785 (1936).

world that has a contrary rule, we should at least begin to "count the 50 million Frenchmen". The doctrine that if its good for Paul and Silas its good enough for me, is undoubtedly a well accepted religious dogma, but if it had been adopted as a Medes and Persians rule in the field of law, we would be still taking an "eye for an eye", and that rule has been repealed even in the field of religion.

It is well to examine here the nature of Mrs. Shirley's property upon the death of her sister. As to the land it goes without citation of authority, that the title to the land descended directly to Mrs. Shirley without going through the administrator. She took title, subject only to the possible lien of creditors if the personal estate was insufficient to pay debts. The personal estate went to the administratrix and Mrs. Shirley merely had a chose in action against the administrix to compel transfer to her upon settlement of the estate.[7] That a legacy is a chose in action — a debt due by the personal representative to the legatee — has been recognized in this state since 1844.[8] Our court stated: "We do not think the assent of the executor to a specific legacy is necessary in this state, to enable the legatee to maintain a suit at law. The general rule in England was that a legatee must resort to a court of equity for relief, but the rule was modified so far as to allow an action at law, after the executor had given his assent [citing cases] but our statute has introduced a change in very broad and unlimited terms. It enacts that any person having a legacy bequeathed in any will and testament, may sue for, and recover the same at common law. H & H 412."

The leading case from other jurisdictions holding that the interest of a legatee is a chose in action is *Chase National Bank v. Sayles*.[9] There Mrs. Sayles was bequeathed a large legacy by her husband. While the legacy was still in the hands of the executors, she, without consideration, executed to one Rupprecht, an assignment under seal to part of the legacy. Rupprecht gave notice of the assignment to the executors, and assigned the claim to plaintiff bank for value. Mrs. Sayles later attempted to repudiate the assignment, and the bank brought suit to enforce the payment. The court held that the interest of a legatee before payment is an equitable interest; that such an interest is assignable

[7]Schouler, Personal Property § 63 (5th ed. 1918) states: "To the same class of incorporeal chattels personal belong legacies and distributive shares. These are sometimes placed among 'equitable choses in action', or rights to be enforced by suit in equity; since the rule formerly was, that if the executor withheld payment, the legatee could maintain no action at law, but had to sue in equity." § 560 says: "For a legacy or distributive share, expectant or vested, is assignable under suitable circumstances like other choses in action or incorporeal chattels."

[8]Worten v. Howard, 2 Smedes & M. 527 (1844).

[9]11 F.2d 948, 48 A.L.R. 207 (5th Cir. 1926) cert. denied 273 U. S. 708. This case was the source of prolific discussion in law journals. See 24 Mich. L.R. 826 (1926); 36 Yale L.J. 272 (1926); 39 Harv. L.R. 368 (1926); 40 Harv. L.R. 129 (1926); 27 Columb. L.R. 86 (1927).

without consideration; and that the assignment constitutes a valid irrevocable gift.

Suppose the question indicated by the title to this article is asked: "Is delivery a pre-requisite to a gift?" Before answering it is obvious that one must or should ask several questions: Delivery of the deed or of the *res*? A gift of what — land, specific chattels, choses in action having written or symbolic evidence of their existence, choses in action having no such evidence of their existence, negotiable choses in action, or non-negotiable choses in action?

Certainly no citation of authority is needed for the statement that there are at least three classes of property extant in Mississippi and that different rules apply as to the necessity of delivery to consummate a gift. These classes are (1) real property (2) specific tangible chattels or personal property capable of manual delivery and (3) choses in action, a term used to denote that class which has no tangible physical existence and which cannot be picked up and delivered to another person. A chose in action is an intangible right which one person has against a second person, to obtain property, the title or possession of which is in that second person.

The possibility of transfering title of at least two of these classes of property has been recognized almost since property rights have been recognized. Certainly the power to transfer title to real property and specific chattels was recognized at the time that the law of gifts was first promulgated, and long before the field of contracts law, as we know it today, had its origin. The power to transfer title of choses in action, the third class, has, however, been recognized for only a comparatively short time, and certainly only since contract law has been developed. It was not always recognized that the breach of a contract or promise, was a legal wrong giving rise to a chose in action against the promise breaker. It is common knowledge that at early common law, the title of a chose in action was not assignable, until a long period after the doctrine of assumpsit was developed.

Our long since dead ancestors of medieval times, felt that because of the personal nature of contracts and because of *their* public policy against buying up choses in actions or law suits — which they considered champertous — that owners of this class of property should be prohibited from transfering the title of this class of property. It was only after a long drawn out battle that equity courts finally drove the comon law courts to recognize the assignability of choses in action; and where the courts would not change fast enough, the legislature put in its two cents by statute such as those requiring the assignee of a chose in action, as the real party in interest, to sue in his own name rather than as some sort of agent or attorney of the assignor with a power to retain he proceeds.

It seems obvious in this day and time, when nearly ninety nine and forty four one hundredths per cent of the world's business is done in the transfer of contract rights and other choses in acion, that *our* public policy toward the transfer of title of choses in action should be somewhat more liberal than that of our long since dead and out-moded ancestors. Certainly we should not adopt a restrictive policy, which would still prohibit such a property owner from disposing of such property, regardless of whether he wanted to sell it or give it away. And certainly, when we have in Mississippi long ago adopted and recognized a liberal rule concerning such a transfer, we should not step backwards and depart from that rule without some sound justification.

Certainly there was a time before people generally learned to read and write when the law did require a symbolical delivery of land in order to effectuate a transfer of the title to that land, whether by sale or by gift. The land could not be picked up and delivered, and hence the law required what was called livery of seizin to effectuate a transfer. A grantor had to go on the land and break off a twig or hand over a handful of dirt from the land. Blackstone[10] discusses livery of seizin as follows: "Feoffment is derived from the verb 'to enfeoff' . . . and it may properly be defined, the *gift* of any corporeal hereditament to another . . . But by the mere words of the deed the feoffment is by no means perfected; there remains a very material ceremony to be performed, called livery of seizin; without which the feoffee has but a mere estate at will. This livery of seizin is no other than the mere feudal investiture or *delivery of corporeal possession* of the land or tenements which was held absolutely necessary to complete the donation. . . And at a time when writing was seldom practiced, a mere oral gift, at a distance from the spot that was given, was not likely to be either long or accurately retained in the memory of the bystanders who were very little interested in the grant. . . Conveyances in writing were the last and most refined improvement. The mere delivery of possession, either actual or symbolic depending on the ocular testimony and remembrance of the witnesses, was liable to be forgotten or misrepresented and frequently incapable of proof. . . Written deeds were therefore introduced in order to specify and perpetuate the peculiar purposes of the party who conveyed; yet still for a very long series of years they were never made use of, but in company with the more ancient and notorious method of transfer, by delivery of corporeal possession"[11] (Emphasis added).

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[10]Chase's Blackstone (4th Edit.) p. 457.

[11]It is interesting to note that in order to free its people from the judicial hangovers of pre-Blackstone times the legislature of Mississippi as late as 1857 found it expedient to enact as Chapter 36, Article 1 of the Code of 1857 a statute which provides: "*Any interest* in or claim to land may be conveyed to vest immediately *or in the future,* by writing signed and delivered; and such *writing* shall have the effect to transfer, according to its terms, the title of the person signing and delivering it, with all

There are many cases in Mississippi now holding that a written instrument conveys the title to *land* whether by way of gift or upon consideration, even though there is no possession given, if properly executed and delivered and are irrevocable, and that equity will not cancel them because there has been a complete failure of a promised consideration, or because there never was a consideration.[12]

Perhaps the most surprising and one of the earliest cases of this nature is *Wall v. Wall*[13] decided in 1855, two years before Section 831 of the Miss. Code of 1942 was originally adopted in 1857.[14] In the *Wall* case a grantor executed a voluntary deed of gift to his brothers and sisters purporting to convey *land* and *personal estate.* The personal estate consisted largely of slaves. The deed recited that it was "to take effect, as far as regards the handing over of the property, at my death; and I reserve to myself the right to revoke it at any time during my life, by filing in the Chancery Clerk's office a written revocation under my hand and seal. And I do hereby make known and declare that the signing, sealing and delivery of this deed, and placing the same amongst my papers, is intended by me as a delivery of said property at my death, and to take effect at that time." It was duly signed and *delivered* by him to his brother. He thereafter called on his brother to hand the paper back to him, which the brother did, and at the death of the grantor it was found amongst grantor's papers. As to the delivery the court said: "This being a voluntary settlement, and the rights of creditors and subsequent purchasers not being involved, the mere fact of the maker retaining the instrument in his own keeping intending that it should be considered as executed and delivered, will not render it invalid for want of delivery." It had of course in fact, however, been

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its instruments [sic] as fully and perfectly as if it were transferred by feoffment with livery of seizin, nothwithstanding there may be adverse possession thereof." This is carried forward and now appears in Section 831, Miss. Code of 1942. (Emphasis added)

[12]Cresswell v. Cresswell, 164 Miss. 871 (1932): "There is no question but that the dictates of human sympathy would say that the grandson, not having parted with anthing by reason of his acceptance of the deed, when his grandmother became dissatisfied because he had ceased to carry out his oral agreement to live with and care for her, should have reconveyed the land to her as freely as she had conveyed it to him; but as much might be said of any such voluntary conveyance."

Campbell v. State Highway Commission, 212 Miss. 437, 54 So.2d 654 (1951); "[A] voluntary conveyance of land can not be vacated at the instance of the grantor upon the ground that it was made without consideration . . . a total failure of consideration for a voluntary conveyance . . . is no ground for a cancellation of the deed. . . .This has been repeatedly decided by this court. . . .In McDaniel v. Johns, 45 Miss. 632 this court said: '*** these deeds of gift, *** were regularly executed and recorded and in which the grantor reserved to himself and wife the use and enjoyment of the property during their natural lives. These conveyances though voluntary are good and effectual as between the parties *** and such conveyances, when they have once been executed and delivered, cannot be recalled *** a man of sound mind may execute a will or deed from any sort of motive satisfactory to him, whether that motive be love, affection, gratitude, partiality, prejudice or even a whim or caprice.'"

[13]30 Miss. 91 (1855), 63 A.L.R. 544 (1929).

[14]See note 11 supra.

actually delivered to a grantee brother. The court, stating that the character of the instrument must be determined upon a consideration of all its parts, said: "It is certainly not necessary to the validity of a deed, that it should convey an estate in immediate possession; but it is necessary that it should take effect in interest upon its execution, though the right of possession or enjoyment may not take place until the happening of a future event.

"As to the real estate in this case, the deed was valid as a covenant to stand seized to the use of the donee, and upon the determination of the life estate reserved to the donor, the estate vested in possession in the donees. [citing cases]

"With regard to the personal estate the rule is generally held by the courts in this country, that a deed conveying chattels to a donee, reserving the possession and use of the property to the donor during his life, is valid, though the deed be not made to a trustee for the parties in interest. [citing cases]

"Upon the whole, we consider that this deed conveyed the present right to the property, to be enjoyed in possession at the donors death, and subject to his power to revoke it in the way limited in the deed."

Thus we have a Mississippi court in 1855 holding that a voluntary deed of gift to both *real* and *personal property* was a perfectly valid conveyance *in praesenti* to be enjoyed in *possession* in *futuro,* even where delivery of the deed was a bit stretched and, more surprisingly, even where the donor reserved the power to revoke. Certainly if it was to be enjoyed in possession in *futuro* there was no "delivery" of the personal property in the lifetime of the grantor, and certainly in this respect the case is contra to *Raley v. Shirley,* supra, which holds that "complete and unconditional delivery is essential to the perfection of such a gift for when the donor retains *dominion and control* over the property or where a *locus poenitentiae* remans in him, there can be no legal title and perfect donation . . . and is founded on grounds of public policy and convenience, to prevent mistakes, imposition and perjury." What this does to the doctrine of "dominion and control" and the "locus poenitentiae" should not happen to a much worse doctrine in a much nicer place!

It may surprise a good many lawyers that a grantor may reserve the right to revoke a deed, but certainly as far as land or real property is concerned the practice ante dates Blackstone. But it will be remembered that the deeds under which we operate at the present time are those which owe their existence to the force and operation of the Statute of Uses, and speaking of the various modes of conveyances Blackstone says:[15] "It was likewise held, that the uses originally declared may be

[15]Chase's Blackstone (4th ed.) p. 476.

revoked at any future time, and new uses may be declared of the land, provided the grantor reserved to himself such a power at the creation of the estate; whereas the utmost that common law would allow, was a deed of defeasance coeval with the grant itself, and therefore deemed a part of it, upon events specifically mentioned. And in case of such revocation, the old uses were held instantly to cease and the new ones to become executed in their stead. And this was permitted, partly to indulge the convenience and partly the caprice of mankind; who (as Lord Bacon observes) always effected to have the disposition of their property revocable within their own time, and irrevocable everafterwards." Continuing, Blackstone in enumerating the various species of conveyances which owed their origin to the Statute of Uses, says:[16] "[T]o these may be added deeds of revocation of use, hinted at in a former page, and founded in a previous power, reserved at the raising of the uses, to revoke such as were then declared; and to appoint others in their stead, which is incident to the power of revocation. And this may suffice for a specimen of conveyances founded upon the Statute of Uses; and will finish our observation upon such deeds as serve to *transfer* real property."

How the idea was ever conceived that donative intent, followed by mere possession of specific chattels, and *oral* testimony as to how that possession was obtained by delivery from the donor (who in a great many cases is dead), can be said to be a valid gift, while donative intent expressed in a solemn writing, duly executed and acknowledged before an officer and delivered, and expressing a conveyance by the donor is ineffective, is difficult to explain. How oral testimony as to both donative intent and delivery is any more likely to keep out mistake, imposition and perjury, than is a duly executed written and acknowledged deed expressing the intent of the donor and his transfer of title is also, to say the least, evasive.

The case of *Wall v. Wall,*[17] supra, was somewhat criticised in *McWillie v. Van Vacter*[18] and under peculiar circumstances. There were only two judges sitting on this case, both of whom had sat on *Wall v. Wall.* Here a grantor of specific chattels conveyed them to grantees with a provision that the "slaves are to remain in the possession and under the control of said grantor during the time of her natural life." It was undisputed that the instrument was improperly acknowledged, not entitled to record, and had never been delivered. The lower court had held the instrument invalid, and of course the non-delivery itself was sufficient reason to sustain the lower court. However, Judge C. P. Smith took occasion to reverse on the ground that "delivery of possession is

[16]Id. at 480.
[17]30 Miss. 91 (1855).
[18]35 Miss. 428 (1858).

essential to the validity of a gift whether attempted to be made by parol or legal instrument in writing." Judge Handy, the only other judge, wrote a specially concurring opinion that the instrument was invalid for improper acknowledgment and nondelivery, but said: "[I]f it had been duly executed and delivered, [it] would have been valid as between donor and donee, to convey the slaves to the donee, to take effect in possession at the donor's death." Without mentioning Judge Smith's criticism again, the Mississippi Court has continued to follow Judge Handy's view and the view of *Wall v. Wall.* Some of the later cases involved specific chattels and land, and some only land.[19]

Thus, if asked whether delivery of possession of the subject matter of the gift is prerequisite to the validity of a gift of *land* in Mississippi, the answer would almost certainly have to be, "no." As to the specific chattels the answer would have to be: "Some of the cases say 'yes' and some say, 'no,' without any of the cases saying that the others are overruled. And *Raley v. Shirley* says: 'yes' although the question was not involved in that case, and the only authority in point[20] that was cited in that case said *Raley v. Shirley* should not have been decided as it was, the subject matter being a chose in action having no physical evidence of its existence."

It is difficult to see why there should be a rule as to specific chattels that is different from that as to land, or, for that matter, as to choses in actions of all kinds. Why a properly executed written instrument should not in all types of cases perform any function that actual delivery supplies is a mystery. Of course, we have Mississippi cases that have never been by name overruled in which it has been held that a written instrument alone is sufficient in the case of lands, of specific chattels, and of choses in action having no written evidence of their existence. In the latter class no Mississippi case has been found which holds that a written instrument alone is ineffective to convey title, and the only case where the point was raised was *Young v. Power,* and it was there recognized that the writing was effective alone. In *Raley v. Shirley,* where this class was involved, the point should have been, but was not raised, and the case was decided on the basis of prior cases dealing with specific chattels, although, even here, as above shown, there are prior Mississippi cases to the contrary.

In *Raley v. Shirley* the court did not tell us why the instrument was not a gift (except that there was no "delivery"); nor why it was not an assignment. Certainly, the court thought, as did Mrs. Shirley and all the grantees, that the instrument did something and that Mrs. Shirley had

[19]McDaniel v. Johns, 45 Miss. 632 (1871) (land and specific chattels); Hiserodt v. Hamlett, 74 Miss. 37 (1896); Graham v. Triplett, 148 Miss. 299 (1927) (land only); McMillan et al. v. Gibson, 222 Miss. 408 (1954) (land only).

[20]Young v. Power, 41 Miss. 197 (1866).

a donative intent, as otherwise they would not have been so particular to tell us that she could "change her mind and could revoke". There must be a mind to do something before it can be changed and there must be an effective instrument of some sort before it can be revoked. And all the prior cases on the point involved in this case as to such choses in action had said that if there was a written instrument executed and delivered with intent to convey an interest in *praesenti* that it was effective for such purpose and irrevocable.

Certainly, on the point that the description of the land may have been bad, we have heretofore held such descriptions good.[21] It must also be remembered that the instrument does not have to be a deed or an assignment in order to effect a gift. Under Sec. 831 Miss. Code of 1942 for land all that is required is a "*writing signed and delivered* . . . which writing shall have the effect to transfer according to its terms, the title of the person signing . . . as fully and perfectly as if it were transferred by feoffment *with livery of seizin,* notwithstanding there may be *adverse* possession." (Emphasis added) And as Judge McGehee has said in speaking of Sec. 831: "Or did not the legislature in keeping with the previously declared intent in that behalf intend to enlarge the right to convey an interest in or claim to land, by permitting it to be done, not only by deed or will, but by *any other instrument of writing,* signed and delivered, by which either the legal or equitable title to land might become vested in a purchaser or another in trust for a third person. We think that such is the proper construction of the statute. . . ."[22] (Emphasis added)

Gifts may be effected in innumerable ways — by deeds, assignments, delivery, trusts, wills, novation and many others. As to trusts no one has any compunction in recognizing the trustor's right to make a reservation of power of revocation. Why should we in deeds? And certainly the "previously declared intent" of the Mississippi court as to the necessity of any specific words to constitute a deed or an assignment has been that we should follow the rule established in Mississippi over a century

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[21]Fairley v. Fairley, 34 Miss. 18 (1857) "all his right title and interest in and to the real and personal estate of the plaintiff's intestate"; Tucker v. Fields, 51 Miss. 191 (1875) "any description of lands, however general and indefinite, which is capable of being made practically certain by other evidence is sufficient"; Stewart v. Cage, 59 Miss. 558 (1882) the description was, "an undivided interest in the estate both real and personal of a deceased person late of a stated county." In an opinion which in its entirety is here copied and contains only one sentence, Judge Campbell says, "The deed was not void for uncertainty." See also Harmon v. James, 7 Smedes & M. (Miss.) 111 (1846); Jones v. Hickson, 204 Miss. 373, 37 So.2d 629 (1948).

[22]Ricks et al. v. Merchants National Bank & Trust Company of Vicksburg et al. 191 Miss. 323, 2 So.2d, 344 (1941). See also Corbin, Contracts, § 914.

ago[23] where it was said: "It is admitted for the purpose of this objection that the instrument was intended and believed by the parties to be a valid and sufficient conveyance; and that this was a mistaken opinion as to its legal effect. The rule in such case is well settled to be that equity will give effect to the real intention of the parties, as gathered from the objects to the instrument, and circumstances of the case, although the instrument may be drawn up in a very inartificial and untechnical manner, if the manifest intent and objects of the parties be clearly presentable on the face of the instrument."

That our court is not really bothered by the necessity of actual delivery of the subject matter of the gift, especially if that subject matter is a chose in action having no written or symbolic evidence of its existence is clearly shown in the case of *In re Lewis Estate*.[24] There a decedent had deposited money in a bank. Nobody knew whether it was his money or his wife's money. In fact he had no money but only some checks, which are, of course, nothing but choses in action against the makers thereof. They were deposited in a bank with only oral instructions to the bank to set up a joint checking account with the proceeds for him and his wife, with right of survivorship to each. Thus, we have a gift of a chose in action with an unknown donor and an unknown donee, as no consideration was paid by anyone. After the deposit either the husband or the wife could have the next day drawn out the entire account. Thus, the unknown donor still had dominion and control of the subject matter and could have revoked the gift by such withdrawal. If the husband was the donor, he made no delivery of any money to his wife, he executed no written deed, assignment or any other writing; he never relinquished dominion and control and reserved a power of revocation, yet the court held this transaction effective and upon the husband's death this chose in action against the bank was no part of his estate. The court said, "If, therefore, the general rule applicable to gifts, that the donor must divest himself of all power over the gift is to be applied, it seems that the gift in such a case must fail. This is the view of some

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[23]Nixon's Heirs v. Carco's Heirs, 28 Miss. 414 (1854). See also Thornton on Gifts and Advancements, §§ 217, 218, "must be such as to authorize belief that gift was intended as judged by those innumerable considerations which no law can define and from all the sources, conclusions should be drawn conformable to the common sense and common understandings of men." See also 16 Am. Jur. Deeds, § 49 (1938), "Technical terms, however, need not be used, and if an intention to pass title is disclosed, the court will give effect to such intention, notwithstanding inaccuracy of expression or inaptness of the words used." Pass v. McRae, 36 Miss. 143 (1858) held that to constitute an assignment of a debt or chose in action no particular form is necessary; and "whenever it sufficiently appears that it is the intention of the parties that the transaction shall be an assignment, there is nothing in the law to prevent its having that effect." See 4 Am. Jur., Assignments, § 75 (1936), "The assignment may be in the form of an agreement or *order* or *any other instrument* which the parties may see fit to use for that purpose." (Emphasis added)

[24]194 Miss. 480, 13 So.2d 20 (1943).

cases.[25] The majority of cases however hold that if the intention of the donor is to vest a present right to share in deposits . . . such an *act* constitutes a gift that can be sustained . . . and the transaction constitutes a completed gift, despite a reserved power of revocation . . . the intention to make a present gift of a joint interest in such deposit may appear in the *statement* of the depositor to the bank or it may be shown by his acount and the attendant circumstances . . . and the gift . . . though not ripening into full ownership until the death of the donor, is not testamentary in character. . . ." In speaking of *Johnson v. Grice*[26] and *Pace v. Pace*[27] the court further said: "neither did those cases have any application to a state of facts disclosing the establishment of a joint bank account . . . and they were authority only on the question as to what is required to be done in a gift of *tangible personal property* as distinguished from the gift of an interest in a credit on the books of a bank." It is difficult to know on what theory the court was purporting to operate for at times they speak of (1) gifts (2) contracts (3) trusts and (4) joint tenancy. It is submitted, however, that this is in line with modern ideas which recognize the fact that a gift may be completed in many ways and that neither actual delivery of the res represented by a chose in action nor actual delivery of the written evidence of the chose itself is necessary.[28] Consider then some of the difficulties that the courts may get themselves into by following the undesirable holding that a deed or gift of specific chattels is ineffective unless followed by such delivery.

In *Gidden v. Gidden*,[29] one of the cases cited in *Raley v. Shirley*, supra, a very sick man was in a hospital in Memphis for an illness of which he died ten days later. He owned 136 bales of cotton stored in a Memphis warehouse and also owned a plantation, the Gardner Place. He executed a deed of gift of the Gardner Place and the 136 bales of cotton to certain grantees. The court said that since this attempted gift was made in contemplation of death it was *therefore* a gift *causa mortis*.

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[25]The court here naturally did not have in mind Raley v. Shirley, supra.

[26]140 Miss. 562, 106 So. 271 (1925).

[27]107 Miss. 292, 65 So. 273 (1914).

[28]Most enlightening material on this general field may be found in Corbin, Contracts §§ 914, 921, 922 (1951) where it is said: "there has been a progressive liberality in the direction of sustaining gift assignments made in various informal ways. This liberality has even been extended so far as to hold that an irrevocable gift of a chose in action can be made by a mere oral communication to the donee or to the obligor. Delivery is impossible if the donor's right is not evidenced by any testimonial document; and in such a case a mere oral statement to the donee has been held effective. . . There are cases definitely holding that an irrevocable gift assignment cannot be made by mere oral communication; and there can be no doubt that this accords with the great weight of judicial dicta. Nevertheless the door has been opened; and courts are not unlikely to give effect to an oral gift when the evidence is convincing and the circumstances are such that the making of the gift was justifiable and reasonable." See also Williston, Gifts of Rights under a Contract in Writing by Delivery of the Writing, 40 Yale L.J. 1 (1930); Bruton, The Requirement of Delivery as Applied to Choses in Action, 39 Yale L.J. 837 (1930).

[29]176 Miss. 98, 167 So. 875 (1936), 48 A.L.R. 2d 1409 (1955).

This was of course contra to what they had said in *Wilson v. Jourdan*[30] where they said that to hold that a grantor could not execute a gift *inter vivos* in his last illness and in contemplation of death would deprive him of the power to dispose of his property absolutely. At any rate they also held that the deed of gift of this cotton was invalid because of non-delivery of the specific cotton. Since the could would not accept a validly executed and acknowledged deed, one wonders whether they would accept the delivery of cotton warehouse receipts, or would they be driven to the necessity of hauling a dying man out to the warehouse and on arrival what woud take place? The only other alternative would be to haul the 136 bales of cotton into his hospital room for delivery there. The court never told us what happened to the Gardner Place. They also called poor Mr. Gidden an "Indian giver."

Consider another possibility. Suppose a man holds another's note for $10,000 due to him. He wants to give $1,000 of that debt due him to his son. Under *Raley v. Shirley* a deed or assignment will be ineffective. Must he deliver the entire note to his son or does he, like Mrs. Shirley just have some property that our court says it is impossible to give away since there is nothing he or she can deliver?

Then finally let us step backward to the gay nineties to a case that confronted the Queen's Bench in England in 1890. A man in England owned a horse which was in France and wanted to give a one quarter share of that horse to a friend. He executed a writing giving him a one quarter share and sent the writing to France. The court in that age applied that part of the *Raley v. Shirley* doctrine that the writing, because it was not a delivered deed, was ineffectual, and never enlightened posterity as to whether he should have delivered the forequarter or the hind-quarter, or how that could be surgically accomplished.[31]

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[30]79 Miss. 133, 29 So. 823 (1901).

[31]Cockrane v. Moore, 25 Q.B. 57 (1890). Even in this case the court stated that under the *old* law a deed of gift of specific chattels was ineffective without actual delivery but that in the reign of Edward IV (circa 1461) a step forward was taken so that a properly executed deed would convey the title. In a few years we will only be 500 years behind!

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STUDENT COMMENTS

MISSISSIPPI WATER CONSERVATION LAW

Introduction

To class Mississippi with the "arid" states would seem preposterous, for like the other states east of the Mississippi River it has historically been envied by the western states for its abundant water resources. Consequently Mississippi has, in the past, followed the riparian doctrine of usufructory rights in water. However, with the approval of the Water Conservation Law[1] on April 6, 1956, Mississippi joined ranks with some seventeen western states which recognize, to some extent, the doctrine of prior appropriation.[2] The passage of this statute is the culmination of efforts started three years ago to gain water legislation.[3] This law may best be described as one which attempts to place all usufructory rights in watercourses under the appropriative doctrine. As such it represents a vast change from the former legal theory of water use in Mississippi. To understand the full import of the act it is first necessary to study the conflicting riparian and appropriative doctrines of water rights, and the extent to which rights under each have been enforced in each of the western states.

Under both doctrines the general rule is that the water right attaching to watercourses and to some lakes and ponds is a right of use and not an ownership of the corpus of the water itself.[4] This usufruct is a property right, and may not be confiscated without condemnation and just compensation,[5] under both the riparian and appropriative doctrine.[6] The acquisition, extent and nature of the usufruct are so entirely different under the two doctrines that a detailed study of each is necessary.

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[1]H. B. No. 232, 1956 Reg. Sess. The text of this statute may be found in 10 Advance Sheet, general Acts of Regular Session 1956, 14-24.

[2]Arizona, California, Colorado, Idaho, Kansas, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington and Wyoming.

[3]The Mississippi Inter-Organizational Committee on Water Resources consisting of representative agricultural, municipal, and manufacturing water users, was formed on July 6, 1953. Its report of December of that year. "The Beneficial Use of Water in Mississippi," contained recommendations concerning the water conservation statutes of some of the western states, and called for the creation of a legislative commission. Pursuant to these suggestions the Mississippi Water Resources Policy Commission was created by House Bill No. 7, Regular Legislative Session 1954. This Commission issued two reports in September, 1955, "Water for the Future in Mississippi" which contained legal and hydrographical information, and its supplement in January, 1956, which contained a legislative proposal which was the basis for the new law.

[4]The Riparian Doctrine: Palmer v. Railroad Comm'n., 167 Cal. 163, 138 Pac. 997 (1914); Wood v. Fowler, 26 Kan. 682, 40 Am. Rep. 230 (1882); Redwater Land and Canal Co. v. Reed, 26 S. Dak. 466, 128 N.W. 702 (1910); Texas Co. v. Burkett, 117 Tex. 16, 296 S.W. 273 (1927). The Appropriative Doctrine: Wall v. Superior Court, 53 Ariz. 344, 89 P.2d 624 (1939); State ex. rel Mungas v. District Court, 102 Mont. 533, 59 P.2d 171 (1936); Albuquerque Land & Irr. Co v. Gutierrez, 10 N. Mex. 177, 61 Pac. 357 (1900); Garner v. Anderson, 67 Utah 553, 248 Pac. 496 (1926).

[5]E.g., see Comstock v. Olney Springs Drainage Dist., 97 Colo. 416, 50 P.2d 531 (1935); Motl v. Boyd, 116 Tex. 82, 286 S.W. 458 (1926). Cases collected in II Kinney, Irrigation and Water Rights, § 769 (2d ed. 1912).

[6]See note 4 supra.

I. The Riparian Doctrines

A. *History and Origins*

The riparian doctrine is not the creature of English common law. Although its true origin is obscured by the dust of the ages[7] it is commonly accepted that its traceable roots go to Roman civil law,[8] although authorities disagree on its course thence to American law. Samuel Wiel, a noted water law authority, maintains that it was received into the English common law through the influence of Chancellor Kent and Justice Story, American jurists who, working independently, took both the word "riparian" and doctrine from the Roman-influenced French civil law.[9] First expressed in England in 1833[10] the doctrine did not become settled until *Wood v. Waud*[11] was decided in 1849. Even though it was not originally part of the English common law most American states recognizing the riparian doctrine base their recognition on statutory adoption of the common law.[12] However, the Texas courts[13] and other authorities[14] state that the doctrine was extant in the American southwest long before the decision of Kent and Story, coming through Mexican and Spanish civil law.

B. *The "Natural Flow" and "Reasonable Use" Theories*

Actually there are two theories in the riparian doctrine, not merely modifications of one doctrine.[15] The "natural flow" theory is that a riparian proprietor is entitled to the natural flow of water through his land undiminished in quantity and unpolluted in quality, except that any riparian may use the water for domestic and household purposes, including watering farm animals.[16] The "reasonable use" or "correlative rights" theory is that each riparian can use water for irrigation or other non-natural but reasonable uses; the amount he uses is limited by the proportionate needs of other riparians on the same body of water.[17] Under both theories a riparian may exhaust the stream flow for natural, *i.e.*, domestic, uses, and pollution is prohibited. It has been said that

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[7]See Mann, "Riparian Irrigation Rights as Declared and Expounded by the Courts, and protected by the Statutes of Texas," Proceedings, Water Law Conferences, 169-172 (1954). According to Mann, the riparian doctrine may be found in Hamurabbi's Code and in the irrigation laws of ancient Egypt.

[8]Wiel, "Theories of Water Law," 27 Harv. L. Rev. 530 (1913).

[9]Wiel, ibid.; Wiel, "Waters, American Law and French Authority," 33 Harv. L. Rev. 133 (1919); Wiel, "The Origin and Comparative Development of the Law of Watercourses in the American Law and in the Civil Law," 6 Cal. L. Rev. 245, 342 (1918). For the first concise statement of the riparian doctrine in America see Tyler v. Wilkinson, 4 Mason 400, 13 Fed. Cas. 312 (1827).

[10]Mason v. Hill, 5 Barn, & Adol. 1, 110 Eng. Rep. 692 (1849).

[11]5 Exch. 748, 154 Eng. Rep. 1047 (1849).

[12]Hutchins, Problems in the Law of Water Rights in the West, 38 (1942).

[13]Motl v. Boyd, 116 Tex. 82, 286 S.W. 458, at pp. 463-467 (1926); State v. Balli, 144 Tex. 195, 190 S.W. 2d 71, at pp. 99-100 (1944).

[14]Davenport and Canales, The Texas Law of Flowing Waters, 8-56 (1949); Hutchins, Problems in the Law of Water Rights in the West, 38-40 (1942); Kinney, Irrigation and Water Rights, 583, 584 (2d ed. 1912); Wiel, Water Rights in the Western States, § 68 (3d ed. 1911).

[15]Restatement, Torts, § 849 (1934).

[16]Hutchins, Problems in the Law of Water Rights in the West, 39 (1942).

[17]Id. at 39-40.

natural flow theory was adopted in the east where rainfall was abundant, while the utilitarian "correlative rights" theory was an outgrowth of the needs of the arid west.[18] Others attribute the difference to divergence in origin.[19] Although the more strict natural flow theory has been adhered to in cases concerning injurious flooding of an upper riparian's land by a lower riparian's dam, or pollution by an upper riparian, or holding back of the entire flow by an upper riparian, even in the east this theory is not unqualified and it has been suggested that the class of cases mentioned above should be distinguished from those in which the actual use of water is in controversy.[20]

C. *Riparian Rights*

Broadly stated, under the riparian doctrine the owner of land contiguous to a watercourse, lake, or pond has certain rights in the water he abuts. These rights are natural and inherent to the ownership of the land, arising by operation of law when the land is patented without reservation of the riparian rights to the sovereign, and passing with the land upon its transfer. They adhere only to land contiguous to or abutting on a natural stream or lake and then, generally, only to land within the watershed of the body of water. Riparian rights arise only in riparian land as originally patented by the sovereign; cutting off land from contiguity to water destroys its riparian character, but purchase of an originally non-riparian parcel by the owner of adjacent riparian land will not make the former riparian. As it is not created by use, a riparian right cannot be destroyed by non-use, though it can be acquired by grant, assent, prescription or adverse user. Riparian proprietors have the right to exhaust the stream flow for natural, domestic uses, and have rights coequal with each other for non-natural uses.[21] The riparian states differ in the application of these general principles, primarily in regards to the lands and waters to which riparian rights attach and the uses to which water may be put.[22]

(1) *Classes of Water Supplies to which Riparian Rights Attach*

Riparian rights do not attach to all classes of water supplies. The states are uniform in holding that they attach to non-navigable watercourses, and though there is conflict the weight of authoriy favors applications of the doctrine to navigable watercourses.[23] These rights are subject to the controlling Federal prerogative over interstate navigation.[24]

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[18]Motl v. Boyd, 116 Tex. 82, 286 S.W. 458 (1926).

[19]Mann, "Riparian Irrigation Rights as Declared and Enforced by the Courts, and Protected by the Statutes of Texas," Proceedings, Texas Water Law Conference (1954).

[20]Hutchins, Problems in the Law of Water Rights in the West, 140 (1942).

[21]Id. at 40-41.

[22]For a concise summary of the riparian rights in the western states see id. at 44-64.

[23]Application — U. S. v. Appalachain Electric Power Co., 311 U. S. 377 (1940); Heilbron v. Fowler Switch Canal Co., 75 Cal. 426, 17 Pac. 535 (1888); Osterman v. Central Nebraska Public Power and Irr. Dist., 131 Neb. 356, 268 N.W. 334 (1936); Motl v. Boyd, 116 Tex. 82, 286 S.W. 458 (1926). Non-application — State ex rel. Ham, Yearsley & Ryrie v. Superior Court, 70 Wash. 442, 126 Pac. 945 (1912).

[24]U. S. v. Appalachain Electric Power Co., 311 U. S. 377 (1940); Arizona v. California, 283 U. S. 423 (1931); U. S. v. Rio grande Dam & Irr. Co., 174 U. S. 690 (1899).

Diffused surface water[25] is usually not subject to riparian rights but is either "owned" or subject to a usufruct by the owner of the land over which it moves,[26] unless it has been made subject to appropriation by statute[27] or is part of a watercourse.[28] A lower landowner, therefore, cannot require continuance of the flow from higher lands.[29] Thus it is essential that the elements of a watercourse be defined in order to determine whether riparian rights will attach to the water. There are few legislative definitions of this term[30] but the courts have been prolific, and the general rule is that a watercourse must have a definite channel with well defined bed and banks, a stream of water flowing with regularity in ordinary seasons, and a definite source of supply.[31] Riparian rights have been found attaching to watercourses which, though originally artificial, by lapse of time and acquiescence of the parties became natural.[32]

Generally the rules of law applicable to surface watercourses apply to well defined underground streams[33] and to the underflow of watercourses.[34] Therefore, riparian rights attach. The difficulty lies in proving the existence of the underground watercourse, for the presumption is that ground waters are percolating,[35] and percolating waters are either

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[25]"Water which in its natural state flows vagrantly over the surface of the ground, or standing, in boggs or marshes, from whatever source." For a discussion of the law of diffused surface water see Hutchins, Problems in the Law of Water Rights in the West, 110-145 (1942).

[26]Gibbs v. Williams, 25 Kan. 214 (1881); Town v. Missouri Pacific Ry., 50 Neb. 768, 70 N.W. 402 (1897); Swett v. Cutts, 50 N.H. 439 (1870); Barclay v. Wilcox, 86 N.Y. 140 (1881); Miller v. Letzerich, 121 Tex. 248, 49 S.W.2d 404 (1932).

[27]N. Dak. Comp. Laws 1913 § 3341; Okla. Stats. Ann. (1936) t. 60, § 60; S. Dak. Code 1939, § 61.0101. See Terry v. Hepner, 59 S. Dak. 317, 239 N.W. 759 (1931).

[28]Southern Ry. v. Lewis, 165 Ala. 555, 51 So. 746 (1910); Lux v. Haggin, 69 Cal. 255, 10 Pac. 674 (1886); Schaefer v. Marthaler, 34 Minn. 487, 26 N.W. 726 (1886); Humphreys-Mexia Co. v. Arseneaux, 116 Tex. 603, 297 S.W. 255 (1927); Broadbent v. Ramsbottom, 11 Exch. 602, 186 Eng. Rep. 971 (1856).

[29]Green v. Carcotta, 72 Cal. 267, 13 Pac. 655 (1887); Curtiss v. Ayrault, 47 N.Y. 73 (1871); Buffum v. Harris, 5 R.I. 243 (1858); Terry v. Hepner, supra note 27, Turner v. Big Lake Oil Co., 128 Tex. 105, 96 S.W.2d 221 (1936); Garns v. Robbins, 41 Utah 260, 125 Pac. 867 (1912); Binning v. Miller 55 Wyo. 451, 102 P.2d 54 (1940).

[30]N. Dak. Comp. Laws 1913, § 5341a: "A watercourse entitled to protection is constituted, if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and definite channel. It is not essential that the supply of water should be continuous or from a perennial living source. It is enough if the flow arises from natural causes and reaches a plainly defined channel of a permanent nature.

[31]See cases collected in Hutchins, Problems in the Law of Water Rights in the West, 9-12 (1942).

[32]Chowchilla Farms v. Martin, 219 Cal. 1, 25 P.2d 435 (1933).

[33]Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585 (1899); Emporia v. Soden, 25 Kan. 588 (1881); Osterman v. Central Nebraska Power & Irr. Dist., 131 Neb. 356, 268 N.W. 334 (1936); Hayes v. Adams, 109 Oreg. 51, 218 Pac. 433 (1923); Deadwood Central R.R. v. Barker, 14 S. Dak. 558, 86 N.W. 619 (1901). See Kan. Gen. Stats. Ann. 1935, §§ 42-301, 42-305, 42-306; N. Dak. Comp. Laws, 1913, § 5341; Okla. Stats. Ann. (1936) t. 60 § 60; S. Dak. Code, 1939, § 61.0101.

[34]Kansas v. Colorado, 206 U. S. 46 (1907); Los Angeles v. Pomeroy, supra note 33; Verdugo Canyon Water Co. v. Verdugo, 132 Cal .655, 93 Pac. 1021 (1905); Motl. v. Boyd, 116 Tex. 82, 286 S.W. 458 (1925); Texas Co. v. Burkett, 117 Tex. 16, 296 S.W. 273 (1927).

[35]Los Angeles v. Pomeroy, supra note 34; Emporia v. Soden, 25 Kan. 585 (1881); Canada v. Shawnee, 179 Okla. 53, 64 P.2d 694 (1936); Hayes v. Adams, 104 Oreg. 51, 218 Pac. 933 (1923); Metcalf v. Nelson, 85 S. Dak. 57, 65 N.W. 911 (1895); Mayer v. Tacoma Light & Water Co., 8 Wash. 144, 38 Pac. 601 (1894).

"owned" exclusively by the landowner under the English rule of capture[36] or "owned" by him subject to correlative rights of adjoining landowners under the California rule.[37] The rights of claimants on a watercourse supplied by naturally tributary percolating water have not been upheld against the landowners overlying these ground waters in jurisdictions recognizing the English rule,[38] though the opposite is the case where the California rule obtains.[39]

The law of watercourses applies to springs which constitute the source of watercourses, and the rights attaching to the watercourse attach equally to such springs.[40] Springs which do not flow out of the tract on which they are located are subject to the prior right of the landowner.[41] Riparian rights also attach to lakes and ponds which supply watercourses, or which touch several tracts of land, but water in a lake wholly situated in one tract, which is not the source of a watercourse, is subject to the prior right of the landowner.[42]

(2) *Amount of Water to which Riparian Rights Attach*

Even in a given stream riparian rights do not always attach to the

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[36]"That the person who owns the surface may dig therein and apply all that is there found to his own purposes at his own freewill and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from the underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action." Acton v. Blundell, 12 M. & W. 324 (1843). This rule has been adopted by statute in three states: N. Dak. Comp. Laws, 1913, s. 5341; Okla. Stats. Ann. (1936) t. 60, s. 60; S. Dak. Code 1939; § 61.0101; and by decision in three others: Emporia v. Soden (Kan.), supra note 35; Taylor v. Welch, 6 Oreg. 198 (1876); Houston & Tex. Central R.R. v. East, 98 Tex. 146, 81 S.W. 279 (1904).

[37]Katz v. Walkinshaw, 141 Cal. 116, 74 Pac. 766 (1903); Gilmore v. Royal Salt Co. 84 Kan. 729, 115 Pac. 541 (1911); Olson v. Wahoo, 124 Nebr. 802, 248 N.W. 304 (1935); Patrick v. Smith, 75 Wash. 407, 134 Pac. 1076 (1913). But see Evans v. Seattle, 182 Wash. 450, 47 P.2d 984 (1935) where it was held the landowner has the right to take ground water for a use reasonable to his land even though the result is to cut off the supply of a neighbor. In Washington waters percolating down the hill slopes confining a valley through which a stream flows do not constitute a defined underground stream. See Meyer v. Tacoma Light & Water Co., 8 Wash. 144, 35 Pac. 984 (1935).

[38]Houston & Tex. Central Ry. v. East, 98 Tex. 146, 81 S.W. 279 (1904). In Kansas however, the taking of waters naturally discharged into a surface stream to the prejudice of prior appropriators on the stream is prohibited by statute. See Kan. Gen. Stats. Ann. 1935, § 42-306.

[39]Houston v. Dailey, 156 Cal. 617, 105 Pac. 748 (1909) laid down the rule that all rights to waters, surface and substream, which form part of a common supply, are correlated. By Cal. Const., Art. XIV, § 3 these correlative rights are subject to the rule of reasonable use. See also Olson v. Wahoo, 124 Nebr. 802, 248 N.W. 304 (1933).

[40]Barneich v. Mercy, 136 Cal. 205, 68 Pac. 589 (1902); Rait v. Furrow, 74 Kan. 101, 85 Pac. 934 (1906); Slattery v. Dout, 121 Nebr. 418, 237 N.W. 301 (1931); Madison v. Rapid City, 61 S. Dak. 83, 246 N.W. 283 (1932); Watkins Land Co. v. Clements, 98 Tex. 578, 86 S.W. 733 (1905); Hollett v. Davis, 54 Wash. 326, 103 Pac. 423 (1932). There are no decisions in Oklahoma or North Dakota, but statutes providing that the landowner owns the water flowing over his land provide that he may not prevent its flow, or the flow of the natural spring from which it commences its definite course. Okla. Stats. Ann. (1936) t. 60, s. 60; N. Dak. Comp. Laws, 1913 § 5341.

[41]Southern Pac. R.R. v. Dufour, 95 Cal. 615, 30 Pac. 783 (1892); Messigner v. Woodcock, 159 Oreg. 435, 80 P.2d 895 (1938); Madison v. Rapid City, supra note 40; Texas Co. v. Burkett, 117 Tex. 16, 296 S.W. 273 (1927); Mason v. Yearwood, 58 Wash. 276, 108 Pac. 608 (1910). See N. Dak. Comp. Laws 1913, § 5341; Okla. Stats. Ann. (1936) t. 60 § 60; Oreg. Code Ann. 1930, § 47-1401; S. Dak. Code 1939, § 61.0101.

[42]Hutchins, Problems in the Law of Water Rights in the West, 40-41 (1942).

entire flow. The general rule is that the riparian proprietor has the right to the *natural flow* of the stream,[43] but the term "natural flow" has been given many constructions by the courts, and the right has been further limited by statutes controlling water use. In California it was held that riparian rights attach to the entire natural flow of the stream, including usual annual floods and usual low water flows, all of which are the "ordinary, usual, periodical and natural flow."[44] This case was instrumental in the passage of a California constitutional amendment in 1928,[45] declaring that the general welfare required that the state's water resources be put to the greatest beneficial use possible, and specifically limiting riparian and other rights in watercourses to that portion of the flow useful for reasonable and beneficial purposes, under reasonable methods of diversion. The reasonableness of the use and the diversion are jury questions.[46] However, the riparian proprietor has a prior and paramount right to the reasonable and beneficial use and if necessary is entitled to the full natural flow of the stream; and this right is guaranteed by the constitutional amendment.[47] But after the riparian's proprietor's prior right is satisfied he cannot require that water in excess of his needs be wasted, as he has no claim on this excess. In California "foreign waters," which originate in a watershed other than that of the stream to which the land is riparian, are not subject to riparian rights,[48] but only to appropriative rights.[49]

Kansas[50] and Oregon[51] have statutes similar to the California constitutional amendment, but in both of these states beneficial use, rather than stream flow, is the measuring device.[52] In Oregon the "waiver theory" obtains, according to which, since riparian rights contemplate tenancy in common while appropriative rights tenancy in severalty, one cannot claim both as a riparian and an appropriator, and election of one right waives the other.[53] Since a claim to a fixed quantity of water from a specific date to the exclusion of use by others has been to be appropriative,[54] the riparian doctrine is little more than a legal fiction as between riparians and appropriators, although riparian rights are recognized as between riparians.

Under the Dakota Territorial Statute[55] riparian rights attached to the natural flow of a stream, which the landowner could not hold back.

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[43]Id. at 38.

[44]Herminghaus v. Southern Cal. Edison Co., 200 Cal. 81, 252 Pac. 607 (1925).

[45]Cal. Const., Art XIV, § 3 (1928), which was held constitutional in Peabody v. Vallejo, 2 Cal. 2d 351, 40 P.2d 486 (1935).

[46]Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal. 2d 489, 45 P.2d 972 (1935); Lodi v. East Bay Municipal Utility Dist., 7 Cal. 2d 316, 60 P.2d 439; Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 81 P.2d 533 (1938).

[47]Meridian v. San Francisco, 13 Cal.2d 424, 90 P.2d 537 (1939).

[48]Bloss v. Rahilly, 16 Cal.2d 70, 104 P.2d 1049 (1940).

[49]Crane v. Stevenson, 5 Cal.2d 387, 54 P.2d 1100 (1936).

[50]Kan. Laws 1945, ch. 390; Gen. Stats. 1949, §§ 82a-701 to 82a-722.

[51]Oreg. Comp. Laws Ann., § 116-403 (1940).

[52]State ex rel. Emery v. Knapp, 167 Kan. 546, 207 P.2d 440 (1949); In re Hood River, 114 Oreg. 112, 227 Pac. 1065 (1924).

[53]In re Deschutes River and its Tributaries, 134 Oreg. 623, 294 Pac. 1094 (1930); Caviness v. La Grande Irr. Co., 60 Oreg. 410, 119 Pac. 731 (1911); North Power Mills Co. v. Coughanour, 34 Oreg. 9, 54 Pac. 223 (1898).

[54]In re Deschutes River and its Tributaries, supra note 53.

[55]Terr. Dak. Civ. Code § 255 (1866).

In *Sturr v. Beck*[56] this statute was held to vest riparian rights so that they could not later be divested by a North Dakota constitutional amendment declaring all flowing streams and watercourses in the state to be public property.[57] The territorial statute has been adopted in North Dakota,[58] Oklahoma[59] and South Dakota.[60] In Oklahoma there has been no judicial definition of "normal flow," and few decisions other than pollution cases. South Dakota has also declined to define this term, though it would seem that the statute gives the riparian proprietor the right to the beneficial use of all water not legally appropriated for irrigation.[61] Such reasonable needs are dependent on conditions and cannot be adjudicated and set out in a decree.[62] The uses are classified by priority, first to ordinary and natural uses, including stock watering, and second for manufacturing, mining or irrigation, and while the riparian may exhaust the stream for the former, rights for the second are co-equal, and the use must be beneficial.[63]

In Nebraska, where riparian rights are recognized only in tracts to which they attached before the passage of the Irrigation Act of 1889 they attach only to the natural and ordinary flow of the stream necessary for use, and the riparian proprietor cannot claim flood waters as against an appropriator.[64] In Texas, *Motl v. Boyd*[65] limits riparian waters to "the ordinary flow and underflow of the stream." When such waters rise above the line of ordinary flow they are regarded as flood waters, to which riparian rights do not attach. A later case held that storm, rain and flood waters, conveyed through a stream from the place of storage to the place of use, do not become part of the riparian waters of the stream.[66]

Washington has defined "riparian waters" as those which can be beneficially used either directly or prospectively within a reasonable time or in connection with riparian lands, the excess being subject to appropriation.[67] Where the water supply is limited the burden of proof is on the appropriator to show that no riparian right will be injured by his use. Riparian rights do not attach to the surplus waters of lakes or streams.[68] In Washington, as in all other riparian states, riparians have rights coequal to each other regardless of the date of settlement.[69]

Generally, storage of riparian water is prohibited if it causes injury to a lower riparian,[70] even if the use to which the water will be put is a reasonable one. In Oklahoma, North Dakota, and South Dakota the statutory prohibition against detaining natural flow would seem to pre-

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56133 U. S. 41 (1890).
57N. Dak. Const. § 210.
58N. Dak. Comp. Laws 1913, § 5341.
59Okla. Stats. Ann. (1936) t. 60 § 60.
60S. Dak. Code 1939, § 61.0101.
61Stenger v. Tharp, 17 S. Dak. 13, 94 N.W. 402 (1903).
62Lone Tree Ditch Co. v. Cyclone Ditch Co., 26 S. Dak. 307, 128 N.W. 596 (1910); Redwater Land & Canal Co. v. Reed, 26 S. Dak. 466, 128 N.W. 702 (1910).
63See note 62 supra.
64Crawford v. Hathaway, 67 Nebr. 324, 93 N.W. 781 (1903).
65116 Tex. 82, 286 S.W. 458 (1926).
66Parker v. El Paso County Water Dist. No. 1, 116 Tex. 631, 297 S.W. 737 (1927).
67Brown v. Chase, 125 Wash. 542, 217 Pac. 23 (1923).
68Proctor v. Sim, 134 Wash. 606, 236 Pac. 114 (1925).
69Hunter Land Co. v. Laugenour, 140 Wash. 558, 250 Pac. 41 (1926).
70Smith v. Miller, 147 Kan. 40, 75 P.2d 273 (1938).

vent storage. In Washington a riparian may not store for a future use if this will deprive other riparians of their use of the stream in its natural condition, although storage for an immediate future use is allowed.[71] This rule is expressed slightly differently in Texas, where it has been held that the riparian right includes the right to store if it is consistent with the rights of other riparians.[72] In California the right to keep water temporarily in forebays and reservoirs for power manufacture does not include the right to detain surplus water above immediate need for future uses.[73]

All western riparian states recognize a priority in riparian uses similar to those set forth by statute in South Dakota,[74] and in regard to "non-natural" or "artificial" uses the criterion of reasonableness is imposed and rights are apportioned according to the amount of land owned by the particular riparian.[75]

(3) *Riparian Land*

The extent of riparian land limits the use of water. Generally riparian land must be contiguous to the source and within the watershed.[76] A tract detached from contiguity to the source is no longer riparian,[77] unless the riparian right is specifically reserved,[78] even if the tract is later reconveyed to the owner of adjacent, contiguous land.[79]

Riparian land is usually limited to the area acquired by a single entry or purchase from the government. In California the limitation extends to the *smallest* tract held under one chain of title from the patent to the present owner,[80] while in Nebraska this limitation is not in force, and apparently by purchase one may increase the size of the riparian tract.[81] A decree partitioning riparian land does not destroy the riparian right, but each tenant in common retains a proportionate interest in severalty.[82]

Although the majority view is that use of the water either beyond the watershed or on non-riparian lands is an infringment on the right of lower riparians,[83] in Texas, although the riparian right is "part and par-

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[71]Still v. Palouse Irr. & Power Co., 64 Wash. 606, 117 Pac. 466 (1911); Tacoma Eastern R.R. v. Smithgall, 58 Wash. 445, 108 Pac. 1091 (1910).

[72]Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 Pac. 607 (1925).

[73]Stacey v. Delery, 57 Tex. Civ. App. 242, 122 S.W.2d 300 (1933); Chicago, Rock Is. & Gulf Ry. v. Tarrant County W. C. & Irr. Dist. No. 1, 123 Tex. 423, 73 S.W.2d 55 (1934).

[74]Stenger v. Tharp, 17 S. Dak. 13, 94 N.W. 402 (1913); S. Dak. Code 1939, § 61.0101.

[75]Hough v. Porter, 51 Oreg. 318, 102 Pac. 729 (1909); Motl v. Boyd, 116 Tex. 82, 286 S.W. 458 (1926); Hunter Land Co. v. Laugenour, 140 Wash. 558, 250 Pac. 41 (1926).

[76]Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 81 P.2d 553 (1938); Clark v. Allaman, 71 Kan. 206, 80 Pac. 571 (1905); Motl v. Boyd, supra note 75; Yearsley v. Carter, 149 Wash. 285, 250 Pac. 804 (1928).

[77]Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 Pac. 978 (1907); Clark v. Allaman, supra note 76; Motl v. Boyd, supra note 76.

[78]Mill & Lux v. J. G. James Co., 179 Cal. 689, 178 Pac. 716 (1919).

[79]See note 77 supra.

[80]Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 81 P.2d 553 (1938).

[81]Crawford v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903).

[82]Copeland v. Fairview Land & Water Co., 165 Cal. 48, 131 Pac. 119 (1913).

[83]See Sayles v. Mitchell, 60 S. Dak. 592, 295 N.W. 390 (1932).

cel of the land,"[84] where there is an abundance of water a riparian can divert water outside the watershed,[85] or to non-riparian lands if the rights of lower proprietors are not thereby affected.

In determining the relative rights of riparian proprietors on lands contiguous to separate branches of streams above the confluence, the branches are considered as lying in separate watersheds. Otherwise the return flow of water taken from one watershed into another for use in the latter would be lost to riparian lands abutting the former. However, where the land is downstream from the confluence, the watersheds of the tributaries and of the stream below the confluence constitute only one watershed.[87] Whether the conveyance of water from one to another would be a reasonable use depends on the circumstances involved.[88]

(4) *Summary*

As it exists today the riparian doctrine confers a qualified, not an exclusive right to divert water for a beneficial use. The result is that no riparian can claim a definite quantity of water, but his right to divert at a specific time depends on many variables, including the nature of the use, the quality of the diverter's land, the stream flow at the time of diversion, and the correlative rights of all other riparians on the stream. Thus some critics have called administration of riparian rights a difficult task, increasing with the size of the stream and the number of riparian proprietors.[89] However, in view of the fact that no riparian may exhaust the stream except for a domestic use, and because the riparian right is vested with the purchase of the land, it would seem that this system is eminently more just than one which would allow exhaustion of a stream under a priority which relates only to the time of the first diversion.

II. The Appropriative Doctrine

The appropriative syste mhas grown in favor in the west, partially because of the definiteness which it provides in administration of water rights. As it is the appropriative system which Mississippi's new Water Law proclaims, this system should be scrutinized so that both its characteristics and the way it can lawfully limit riparian rights may be seen.

A. *Origin*

Even as there is disagreement concerning the origin of the riparian doctrine, so authorities disagree on the appropriative. Its roots go to three different sources. In the early ninteenth century irrigation was from community acequias in parts of the southwest, and a system of administration of water rights similar to appropriation was in force under

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[84]Parker v. El Paso Water & Irr. Dist No. 1, 116 Tex. 631, 297 S.W. 737 (1927).

[85]Watkins Land Co. v. Clements, 98 Tex. 578, 86 S.W. 733 (1905).

[86]Texas Co. v. Burkett, 117 Tex. 16, 296 S.W. 273 (1927); Matagorda Canal Co. v. Markham Irr. Co., 154 S.W. 1176 (Tex. Civ. App. 1913).

[87]Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 Pac. 978 (1907).

[88]Crane v. Stevenson, 15 Cal.2d 387, 64 P.2d 1100 (1936); Holmes v. Nay, 186 Cal. 231, 199 Pac. 325 (1921).

[89]See Harris v. Harrison, 93 Cal. 676, 29 Pac. 325 (1892).

the Spanish and Mexican civil law.[90] The Mormon community agricultural developments, under the control of the church, also employed appropriative rights.[91] Finally the gold miners in California established a system of "first in time, first in right" which was applied both to mineral claims and water.[92] In 1855 appropriative rights were first recognized by the Supreme Court of California,[93] and in 1872 the California legislature provided a method of water appropriation which was essentially a codification of the miners' customs.[94] By 1900 seventeen of the western states had adopted the appropriative doctrine.[95]

One of the most concise summaries of the law of prior appropriation may be found in *Union Mill & Mining Co. v. Danberg*:[96]

> Under the principles of prior appropriation the law is well settled that the right to water flowing in the public streams may be acquired by an actual appropriation of the water for beneficial use; that, if it is used for irrigation, the appropriator is only entitled to the amount of water that is necessary to irrigate his land, by making a reasonable use of the water; that the object had in view at the time of the appropriation and diversion of the water is to be considered in connection with the extent and right of appropriation; that, if the capacity of the flume, ditch, canal or other aqueduct, by means of which the water is conducted, is of greater capacity than is necessary to irrigate the lands of the appropriator, he will be restricted to the quantity of water needed for the purpose of irrigation, for watering stock, and for domestic uses; that the same rule applies to an appropriation made for any other beneficial use or purpose; that no person can, by virtue of his appropriation, acquire a right to any more water than is necessary for the purpose of his appropriation; that, if the water is used for the purpose of irrigating lands owned by the appropriator, the right is not confined to the amount of water used at the time the appropriation is made; that the appropriator is entitled, not only to his needs and necessities at that time, but to such other and further amount of water within the capacity of his ditch, as would be required for the future improvement and extend cultivation of

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[90]Clough v. Wing, 2 Ariz. 371, 17 Pac. 453 (1888); U. S. v. Rio Grande Dam & Irr. Co., 9 N. Mex. 292, 51 Pac. 674 (1898). Some authorities have said that the doctrine was founded in Roman civil law. Hutchins, The Community Acequia: Its Origin and Development, 31 Southwestern Historical Quarterly 261-284 (1928); National Reclamation Assn., "Preservation of Integrity of State Water Laws," Report and Recommendations of Committee Appointed at 1942 Convention, 165-168 (1943).

[91]I Kinney, Irrigation and Water Rights, 402-403 (2d ed. 1912).

[92]Harding, Water Rights for Irrigation, 4-5 (1936); I Wiel, Water Rights in the Western States, 68-73 (3d ed. 1911).

[93]Hill v. Newman, 5 Cal. 445, 63 Am.Dec. 140 (1855).

[94]Cal. Civ. Code §§ 1410-1422 (1872).

[95]Terr. Ariz., Howell Code, ch. LV (Oct. 4, 1864); Colo. Laws 1861, p. 361; Idaho Laws 1881, p. 267; Kan. Laws 1886, ch. 115; Bannacle Stats., p. 367 (Montana 12 Jan., 1865); Nebr. Laws 1889, ch. 68; Lobdell v. Simpson, 2 Nev. 274, 90 Am. Dec. 537 (1866); N. Mex. Laws, July 20, 1851; N. Dak. Laws 1899, ch. 173; Terr. Okla. Laws 1897, ch. XIX; Oreg. Laws 1891, p. 52; South Dakota, Terr. Dak. Laws 1881, ch. 142; Tex. Gen. Laws 1876, ch. CL; Utah Laws 1891, p. 219; Wash. Sess. Laws 1889-90, p. 706; Wash. Sess. Laws 1891, ch. CXLII; Terr. Wyo. Comp. Laws 1876, ch. 65 (Dec. 10, 1875).

[96]81 Fed. 73 (10th Cir. 1897).

> his lands, if the right is otherwise kept up; that the intention of the appropriator, his object and purpose in making the appropriation, his acts and conduct in regard thereto, must be considered by the courts in connection with the extent of his actual appropriation and use, in determining and defining his rights; that the mere act of commencing the construction of a ditch with the avowed intention of appropriating a given quantity of water from a stream gives no right to the water unless this purpose and intention are carried out by the reasonable, diligent and effectual prosecution of the work to the final completion of the ditch, and diversion of the water to some beneficial use; that the rights acquired by the appropriator must be exercised with reference to the general condition of the country and the necessities of the community, and measured in its extent by the actual needs of the particular purpose for which the appropriation is made and not for the purpose of obtaining a monopoly of the water, so as to prevent its use for a beneficial purpose by other persons; that the diversion of the water ripens into a valid appropriation only where it is utilized by the appropriator for a beneficial use; that the surplus or waste water of a stream may be appropriated, subject to the rights of prior appropriators, and such an appropriator is entitled to use all such waters; that, in controversies between prior and subsequent appropriators of water, the question generally is whether the use and enjoyment of the water for the purposes to which the water is applied by the prior appropriator have been in any manner impaired by the subsequent appropriator.

This statement, is, of course, qualified by the particular provisions of the various water statutes. However, it outlines the general tenets of the doctrine. In all the western states except Idaho the statutory method of acquiring an appropriative right is exclusive, and in Idaho use of the statutory procedure is beneficial, as the priority dates from the time the statutory application to appropriate is made, as against a priority's dating from the actual beneficial use of the water.[97]

B. *Administrative Procedure*

Administrative procedure for the acquisition of appropriative rights has become highly developed, and the statutory procedures are generally based on those originated either in Colorado or Wyoming. Under the "Colorado system" permits are not required to begin construction of the diversion works, but the prospective appropriator begins work on his aqueduct and then files a claim with the State Engineer. Responsibility for the distribution of water is placed on division engineers and district commissioners under supervision of the State Engineer, and jurisdiction over adjudication of priority questions is vested exclusively in the courts, upon petition of water right claimants. Under the "Wyoming system" the appropriator must first apply to the State Engineer for a permit to begin his works. All functions concerning acquisition and adjudication of priority of rights are vested in a Board

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[97]Hutchins, Problems in the Law of Water Rights in the West, 75 (1942).

of Control, composed of the State Engineer and four water superintendents, from which appeal to the courts is provided. Distribution of water according to priority is under control of the organization of division supervisors and district commissioners, headed by the State Engineer.[98]

C. *Elements of the Appropriative Right*

No matter what system of acquisition is used, the appropriative right embodies several general elements which should be studied. *Rocky Ford Canal Co. v. Cox*[99] gives a clear picture of these elements:

> When an appropriation of water has been made and the right to use thereof perfected, certain elements involved in that right are (a) quantity of water appropriated; (b) time, period or season when the right to use the water appropriated; (c) the place upon the stream at which the right of diversion attaches; (d) the nature of use or the purpose to which the right of use applies, such as irrigation, domestic use, culinary use, commercial use or otherwise; (e) the place where the right of use may be applied; (f) the priority date of appropriation or right as related to other rights and priorities. There are also certain limitations, restrictions, responsibilities and duties pertaining to a water right. It must be used economically or without waste. It must be so controlled and used as not to damage others. It is so related to the rights of others that regulations are required. When necessary, periods of rotation may be imposed.

(1) *Quantity, Time and Diversion*

The appropriative right refers to a definite quantity of water, measured in cubic feet per second or miners' inches in diversions for direct irrigation, and in acre feet in diversion for storage. Some statutes limit the quantity of water which may be appropriated.[100] However, as reclamation of land usually takes longer than one year and is a continuing process, the amount of water put to beneficial use during the first year is not necessarily the yearly amount allowed under the appropriation.[101]

The appropriative right relates to a period during which water may be diverted. If the appropriator only uses water during a certain number of days in the week or month other appropriators may be entitled to use during the remaining time.[102] Rotation, by which each user is entitled

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98Ibid.

9992 Utah 148, 59 P.2d 935 (1936).

100As in Nebraska, where no allotment for the natural stream flow for irrigation shall exceed one second-foot for each 70 acres, or 3 acre feet per acre during a calendar year. Neb. Comp. Stats. 1929, § 1.4.1. This statute, however, has been held not applicable to a pre-existing appropriative right. Enterprize Irr. Dist. v. Willis, 135 Nebr. 827, 284. N.W. 326 (1939).

101Haight v. Costanich, 184 Cal. 426, 194 Pac. 26 (1920); Wheldon Valley Ditch Co. v. Farmers' Pawnee Canal Co., 51 Colo. 545, 119 Pac. 1056 (1911); Campbell v. Wyoming Dec. Co., 55 Wyo. 347, 100 P.2d 124 (1940).

102Smith v. O'Hara, 43 Cal. 371 (1872); Galiger v. McNulty, 80 Mont. 339, 260 Pac. 401 (1927); Barnes v. Sabron, 10 Nev. 217 (1875); Davis v. Chamberlain, 51 Oreg. 304, 98 Pac. 154 (1908); Cleary v. Daniels, 50 Utah 494, 167 Pac. 820 (1917). Where only the daytime flow had been diverted to beneficial use prior to a certain time, the rights under the appropriation were held limited to daytime use, and night appropriation by others was allowed, subject to intervening rights of the daytime appropriator. Thorne v. McKindley Bros., 5 Cal.2d 704, 56 P.2d 204 (1934).

to divert only for a certain number of days out of a specified period, is provided for by statute in several states.[103]

Appropriation includes an actual diversion of water from the source of supply.[104] Thus where irrigation has been by overflow of a river, some states have held that no appropriative right was acquired,[105] though others have said that where in practice no artificial works are required, if one has the requisite intent to appropriate he may reap the benefit of natural overflow.[106] An appropriator may perfect his right by diversion over another's land, though he cannot do so without the owner's consent,[107] or condemnation of the land, statutory provisions for the latter having been held constitutional.[108] Some states hold that an appropriation is void if initiated in trespass upon private land,[109] while others hold that it is only voidable as against the owner, who has retained the right to grant an easement.[110]

Although reasonable loss of water in transit between the point of diversion and the place of use does not affect the validity of the appropriation[111] the diversion works must be maintained in such condition and the water distributed and applied in such manner as to cause the least possible waste, if diversion of the full amount of water called for is to be allowed.[112] Although appropriators will be forced to expend some money in keeping up their diversion works, to prevent substantial leaks which materially deprive others of water, they are not required to reconstruct the system if such is typical of those used in the community.[113] This rule has been said, by those who would enforce the use of modern diversion systems, to lead to waste.

(2) *Application to Beneficial Use*

To perfect an appropriation there must be proof of beneficial use,

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[103]See Ariz. Rev. Code 1928, § 3313; Kan. Gen. Stats. 1935, 42-340 to 42-347; Colo. Stats. Ann. 1935, ch. 90, § 110; Wyo. Rev. Stats. 1932, § 122-308.

[104]Windson Res. & Canal Co. v. Lake Supply Ditch Co., 44 Col. 214, 98 Pac. 729 (1908); Murray v. Tingley, 20 Mont. 260, 50 Pac. 723 (1897); Walsh v. Wallace, 26 Nev. 299, 67 Pac. 914 (1902); McPhail v. Forney, 4 Wyo. 556, 35 Pac. 773 (1894).

[105]Walsh v. Wallace, supra note 104.

[106]Oldfield v. Ish, 21 Wash. 277, 57 Pac. 880 (1899); McCall v. Porter, 42 Oreg. 49, 70 Pac. 820 (1902). A later Oregon case suggested that although natural irrigation by overflow was a valid appropriation, the change to a controlled diversion system should be made within a reasonable time where circumstances permitted. Masterson v. Pacific Livestock Co., 144 Oreg. 396, 24 P.2d 1046 (1933).

[107]Sternberger v. Seaton Mt. & Co., 45 Col. 401, 102 Pac. 168 (1909); Marshall v. Niagra Springs Orchard Co., 22 Idaho 144, 125 Pac .208 (1912); Prentice v. McKay, 38 Mont. 114, 98 Pac. 1081 (1909); Talbot v. Joseph, 79 Oreg. 308, 155 Pac. 184 (1916).

[108]Clark v. Nask, 198 U. S. 361 (1905).

[109]Bassett v. Swenson, 51 Idaho 256, 5 P.2d 722 (1935); Connolly v. Harrel, 102 Mont. 295, 57 P.2d 781 (1936); Monton v. Coast Property Corp., 151 Oreg. 208, 46 P.2d 1029 (1931).

[110]Schneck v. Nichols, 55 Wyo. 4, 95 P.2d 74 (1939).

[111]Barrows v. Fox, 98 Cal. 63, 32 Pac. 811 (1893); Basinger v. Taylor, 36 Idaho 591, 211 Pac. 1085 (1922); In re Althouse Creek, 85 Oreg. 224, 162 Pac. 1072 (1917).

[112]Sterling v. Pawnee Ditch Extension Co., 42 Colo. 421, 94 Pac. 339 (1908); Clark .v Hansen, 35 Idaho 449, 206 Pac. 808 (1922); Cook v. Evans, 45 S. Dak. 31, 185 N.W. 262 (1921); Biggs v. Miller, 147 S.W. 632 (Tex. Civ. App. 1912).

[113]Jerger v. Pacific Gas. & Elec. Co., 207 Cal. 8, 276 Pac. 1017 (1929); Basinger v. Taylor, 36 Idaho 591, 211 Pac. 1085 (1922); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939).

including proof of place of use—irrigated land, power plant, mill or mine. Although generally appropriators may transport water outside the watershed,[114] this is prohibited in some states.[115] Under certain circumstances the place of use may be changed, though the rule varies from that of Arizona, where the transfer may be made only when through natural causes it becomes impracticable to use the water economically and beneficially on the tract in connection with which the right was acquired,[116] to that of Colorado, where "a water right may be alienated apart from the land, or its use transferred from one place to another, or even the character of the use changed, provided only that in each instance no injury results to vested rights of other appropriators."[117] Almost all the statutes require sanction of the state administrative agency prior to a change in place of diversion, use or character of use, and if such change results in injury to other appropriators it will not be sanctioned.[118]

Although there must be application of water to the land to perfect an appropriative right for irrigation, it is not necessary that the appropriator own the land; if he is rightfully in possession of the land the right of appropriation does not attach to the land but is the appropriator's personal property.[119] Even in states which do not follow this rule it has been held that an appropriation may be made for the sale or rental of water; otherwise, irrigation companies and co-operatives could not exist.[120]

(3) *Priority of Rights*

Where the supply of water is not sufficient for all appropriative claimants priority of date determines the right, as the right is exclusive and not correlative.[121] In states where the doctrine of relation obtains, priority relates to the commencement of diversion operations, if the appropriator has pursued them to completion and beneficial application with due diligence.[122] The amount of water to which the appropriator

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[114]Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).

[115]N. Mex. Stats. Ann. Comp. 1929, § 151-178. Some states, however, prohibit extra-watershed use only if without a permit. Vernon's Tex. Stats. 1936, Rev. Civ. Stats., Arts. 7589, 7590.

[116]Tattersfield v. Putnam, 45 Ariz. 156, 41 P.2d 228 (1935).

[117]Hassler v. Fountain Mutual Irr. Co., 93 Colo. 246, 26 P.2d 102 (1933).

[118]Strickler v. Colorado Springs, 16 Colo. 61, 26 Pac. 313 (1891); Mannix Wilson v. Thrasher, 95 Mont. 267, 26 P.2d 373 (1933); Broughton v. Stricklin, 146 Oreg. 259, 28 P.2d 219 (1933). In Montana a change from power to agricultural use amounts to a new appropriation, dating from the time of the change of the original power purpose. Featherman v. Hennessey, 43 Mont. 310, 115 Pac. 983 (1911). But if no appropriators are injured the validity of the appropriation will not be affected by a change from mining to agricultural use. Peck v. Simon, 101 Mont. 12, 52 P.2d 164 (1935).

[119]Kountz v. Olson, 94 Colo. 186, 29 P.2d 627 (1934); Smith v. Deniff, 24 Mont. 20, 60 Pac. 398 (1900); Laurance v. Brown, 94 Oreg. 387, 185 Pac. 761 (1909). In Arizona appropriations must be made by the "owner or possessor", though lessor is considered "possessor." Tattersfield v. Putnam, 45 Ariz. 156, 41 P.2d 228 (1935).

[120]Gould v. Maricopa Canal Co., 8 Ariz. 429, 76 Pac. 598 (1904); Combs v. Farmers' High Line Canal & Res. Co., 38 Colo. 420, 88 Pac. 396 (1907); Bailey v. Timtiger, 45 Mont. 154, 122 Pac. 575 (1912); Sowards v. Meagher, 37 Utah 212, 108 Pac. 1112 (1910).

[121]Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278 (1893).

[122]Under the doctrine of relation, the time of priority relates to the time the diversion was commenced, not the time water was beneficially applied. Also if the appropriator continued his reclamation work with due diligence, applying the water to

is entitled is not reduced by the use of the same ditch by subsequent appropriators.[123] Priority does not depend on the point of diversion—whether at the head or mouth of a stream. The appropriative right attaches to the stream in its natural condition at the time the appropriation is made and the appropriator is entitled to a sufficient amount of water at his point of diversion to satisfy his right regardless of heavy loss in the stream bed and through evaporation.[124] Protection is given only against those interferences which result in material and substantial injury to the prior appropriator.[125] However, a junior appropriator may demand maintenance of the stream conditions obtaining at the time of his appropriation, as a prior appropriator cannot enlarge his right by excessive use not within his priority.[126] A new appropriation is the exclusive means of enlarging an appropriative right, and the enlargement is junior to the completed right.[127]

(4) *Purpose of Use – Preferences*

An appropriative right may be acquired for a beneficial purpose only. What is beneficial is a question of fact and depends on the circumstances of each case.[128] The term "beneficial use" has come to be modified by the requirements of "reasonable use"[129] including local customs of diversion, distribution, and water use. A domestic use implies use for preservation and maintenance of the household, including the watering of domestic animals and probably extends to the irrigation of family gardens.[130] The watering of an entire herd is considered stock

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a beneficial use as soon as he had readied more land for irrigation an application several years after the commencement of the diversion works might come within the original appropriation. See Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 147 Pac. 1073 (1915).

[123]Simpson v. Bankofier, 141 Oreg. 426, 16 P.2d 632 (1933).

[124]Atcheson v. Peterson, 87 U. S. 507 (1874); Morris v. Bean, 146 Fed. 423 (1906); Joerger v. Pacific Gas & Elec. Co., 207 Cal. 8, 276 Pac. 1017 (1929); Ravndal v. Northfor Placers, 60 Idaho 305, 91 P.2d 368 (1939); Carson v. Hayes, 39 Oreg. 97, 65 Pac. 814 (1901); Lone Tree Ditch Co. v. Rapid City Elec. & Gas Light Co., 16 S. Dak. 451, 93 N.W. 650 (1903); Logan Hyde Park & Smithfield Canal Co. v. Logan City, 72 Utah 221, 269 Pac. 776 (1928).

[125]Dameron Valley Res. & Canal Co. v. Bleak, 297 U. S. 517 (1936); Lower Latham Ditch Co. v. Louden Irr. Canal Co., 27 Colo. 267, 60 Pac. 629 (1900).

[126]Clough v. Wing, 2 Ariz. 371, 17 Pac. 453 (1888); Senior v. Anderson, 130 Cal. 290, 62 Pac. 563 (1900); Fort Lyon Canal Co. v. Chew, 33 Colo. 392, 81 Pac. 37 (1905); Twaddle v. Winters, 29 Nev. 88, 85 Pac. 280 (1906); Manning v. Fife, 17 Utah 232, 54 Pac. 111 (1898); Johnson v. Little Horse Creek Irr. Co., 13 Wyo. 208, 79 Pac. 22 (1904).

[127]Lobdell v. Simpson, 2 Nev. 274 (1866); Ophir Silver Mines Co. v. Carpenter, 4 Nev. 534 (1868). This rule does not apply in states recognizing the doctrine of relation, where the subsequent diversion has been made pursuant to the original project, and the over all reclamation project completed in due diligence. See note 122 supra.

[128]Denver v. Sheriff, 105 Colo. 193, 96 P.2d 838 (1939).

[129]Meridian v. San Francisco, 13 Cal.2d 424, 90 P.2d 537 (1939); Sterling v. Pawnee Ditch Extension Co., 42 Colo. 421, 94 Pac. 339 (1908); Doherty v. Pratt, 34 Nev. 343, 124 Pac. 574 (1912); Little Cottonwood Water Co. v. Kimball, 76 Utah 243, 289 Pac. 116 (1930); Shotwell v. Dodge, 8 Wash. 337, 36 Pac. 254 (1894).

[130]Lux v. Haggin, 69 Cal. 255, 10 Pac. 674 (1886); Montrose Canal Co. v. Loutzenhizer Ditch Co., 23 Colo. 233, 48 Pac. 532 (1896); Hough v. Porter, 51 Oreg. 318, 102 Pac. 728 (1909). See Idaho Code Ann. 1932, §§ 41-111, 41-814; S. Dak. Code 1939, § 61.0731; Vernon's Tex. Stats. 1936, Rev. Civ. Stats. art. 7471.

watering, for which a separate appropriation must be made.[131] Appropriations may be made for water storage.[132]

The majority of western states have statutes providing preferences in appropriative water uses. These apply usually where two applications are made to appropriate from the same source, and differ greatly in import. The Arizona statute provides that in time of scarcity the owners of land shall have priority for irrigation according to the date of their appropriation.[133] This has been construed to declare not only a priority of diversion but a priority of use and appropriation, which governs in determining conflicting rights.[134] The statute provides that when two or more applications are pending for appropriative rights in the same source, and there is is not sufficient water to meet both, preference shall be given, (1) domestic and municipal uses, including gardens not to exceed one half acre for each family; (2) irrigation and stock watering; (3) water power and mining.[135] There is also a reservation of unappropriated water to meet the growing needs of expanding municipalities, with provisions for approval of municipal applications to the exclusion of subsequent applications if, in the commissioner's opinion, the municipal needs require it.[136]

The California statute declares that the two preferred uses are, respectively, domestic and agricultural, and requires that the commissioner grant appropriative rights under such terms as will best develop, conserve and utilize the state's water resources.[137] In Colorado there is statutory provision for pro rata division of water when the supply is insufficient.[138] The constitution declares that domestic uses have priority above all others, and that agricultural uses are prior to manufacturing.[139] Texas has the most complete delineation of priorities: "1. Domestic and municipal uses, including water for sustaining human life and the life of domestic animals. 2. Water to be used in processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, and to include water necessary for the development of electric power by means other than hydroeletric. 3. Irrigation. 4. Mining and recovery of minerals. 5. Hydro-electric power. 6. Navigation. 7. Recreation and pleasure."[140] It is apparent that under the appropriative system such statutes are necessary for the administration of rights and the utilization of water, and that the more completely delineated the priorities, the more easily problems arising between applicants may be settled.[141]

131Lux v. Haggin, supra note 130; Adams v. Portage Irr. Res. & Power Co., 95 Utah 1, 72 P.2d 648 (1937).

132Meridian v. San Francisco, 13 Cal.2d 424, 90 P.2d 838 (1939); In re Willow Creek, 74 Oreg. 592, 144 P. 505 (1914).

133Ariz. Rev. Code 1928, § 3320.

134Biggs v. Utah Irr. Ditch Co., 7 Ariz. 331, 64 Pac. 494 (1901).

135Ariz. Rev. Code 1928, § 3285.

136Ibid.

137Deering's Gen. Cal. Laws 1937, vol. 2, act 9091, §§ 15,20.

138Colo. Stats. Ann. 1935, ch. 90, § 18; Colo. Const. Art. XVI, § 6. The Idaho constitutional provision is similar to that of Colorado. Idaho Const. Art. XV, § 5.

139Okla. Stats. Ann. (1936), t. 82, § 577.

140Vernon's Tex. Stats. 1936, Rev. Civ. Stats., art. 7471. Texas also has provisions for increase in municipal water needs (art. 7472) and other priorities of water use (arts. 7503, 7506, 7507, 7510, 7545).

141For other statutes delineating priority of use, see: Kan. Gen. Stats. Ann. 1935,

In the majority of states these statutes apply only to *applications* for permits, and not to perfected rights, but in Washington and Wyoming statutes provide for the condemnation of an inferior use in favor of a preferred use.[142] In Washington the court has held that in the public interest an applicant for a domestic use could condemn the water supply on the land of another where the water was not being utilized by the land owner.[143] Although the owner of an inferior use may change to a preferred use in Wyoming, this does not alter the priority in relation to other priorities not involved in the adjudication.[144] Generally compensation must be made for the condemnation of a perfected water right.[145]

Appropriated water may be conveyed through a natural channel without loss of ownership,[146] but the requirement that the diversion system be reasonably efficient applies to natural aqueducts, which cannot be used if their condition is conducive to excessive loss.[147]

(5) *Transfer and Loss*

As an appropriative right is an interest in real estate in most jurisditcions it may be transferred, provided the rights of others are not affected, and this is true even in some jurisdictions where the appropriative right is declared appurtenant to the land.[148] The right may be lost by common law abandonment, which requires intent to abandon and actual non-use for a reasonable time[149] (which may be less than the statutory prescriptive period), by forfeiture,[150] or by statutory adverse

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§§ 42-301, 42-305; Neb. Const. Art. XV, § 6; Neb. Comp. Stats. 1929, § 81-6317, 81-6318; Nev. Comp. Laws 1929, §§ 7948, 7950; N. Mex. Stats. Ann., Comp. 1929, §§ 151-153, 151-134, 151-404; N. Dak. Comp. Laws 1913, § 8257; N. Dak. Laws 1939, ch. 256, § 16; Oreg. Code Ann. 1930, §§ 47-1403, 47-503 (as amend. Laws 1937, ch. 235), 47-508 (as amend. Laws 1939, ch. 56), 47-501; Oreg. Laws 1931, ch. 67; S. Dak. Code 1939, §§ 61.0125, 61.0126, 61.0152; Utah Rev. Stats. 1933 § 100-3-8 (as amend. Laws 1939, ch. 11); Wash. Rem. Rev. Stats. 1931, §§ 7534, 7382 (as amend. Laws 1939, ch. 127); Wyo. Const. Art. VIII, § 3; Wyo. Rev. Stats. 1931, §§ 122-402, 122-403, 122-406.

142Wash. Rem. Rev. Stats. 1931, §§ 7354, 7382 (as amend. Laws 1939, ch. 11); Wyo. Rev. Stats. 1931, §§ 122-402, 122-403, 122-406.

143State ex rel. Anderson v. Superior Court, 119 Wash. 406, 205 Pac. 1051 (1922).

144Newcastle v. Smith, 28 Wyo. 371, 205 Pac. 305 (1922).

145Sterling v. Pawnee Ditch Extension Co., 42 Colo. 421, 94 Pac. 339 (1908); Ravndal v. Northfork Placers, 60 Idaho 305, 91 P.2d 368 (1939). This is true whether compensation is included in the statute or not, though the ietms which may be claimed in valuation of water rights may be limited by statute, as in Arizona, California and Oregon.

146Hoffman v. Stone, 7 Cal. 49 (1877). This is now provided by statute in all western states. See Nev. Comp. Laws 1929, §§ 7896, 7963, 8238; Oreg. Code Ann. 1930, § 47-704; Vernon's Tex. Stats., Rev. Civ. Stats. 1936, arts. 7546, 7548; Wyo. Rev. Stats. 1931, § 122-1505.

147Stickney v. Hanrahan, 7 Idaho 42, 63 Pac. 189 (1909); Hagadone v. Dawson County Irr. Co., 136 Nebr. 258, 285 N.W. 600 (1939).

148Hutchins, Problems in the Law of Water Rights in the West, 386 (1942).

149Brockman v. Grand Canal Co., 8 Ariz. 451, 76 Pac. 602 (1904); Utt v. Frey, 106 Cal. 392, 39 Pac. 807 (1895); Green Valley Ditch Co. v. Frantz, 54 Colo. 226, 129 Pac. 1006 (1913); Gassert v. Noyes, 18 Mont. 216, 44 Pac. 959 (1898).

150In re Manse Spring and Its Tributaries, 60 Nev. 280, 108 P.2d 311 (1940). Statutes and cases collected in Hutchins, Problems in the Law of Water Rnghts in the West, 392-394 (1942).

user and prescription.[151] The ramifications of prescriptive loss of appropriative rights vary with each jurisdiction, depending on such factors as whether the statutory method of acquisition or changing the point of use is exclusive, whether forfeiture results from illegal use by an adverse possessor, whether the statutory period of forfeiture is less than the prescriptive period,[152] or whether the appropriative right may be detached from the land to which it is appurtenant.

III. Coordinating Riparian and Appropriative Rights

As the appropriative doctrine is one of priority of time alone without regard to ownership of land, while the riparian doctrine rests on land ownership, conflict between the two systems is inevitable. This conflict has brought further limitation of the riparian right, primarily because the courts of many of the western states felt that the riparian doctrine did not allow full utilization of state water resources. These limitations are primarily found in the lands and classes of water to which riparian rights apply.

A. *Lands — The Desert Land Act*

The most successful single factor in derogation of riparian rights was the "Desert Land Act" of March 3, 1877,[153] which applied specifically to Arizona, California, Idaho, Montana, Neveda, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming, and by amendment on March 3, 1891, to Colorado.[154] The important provision of this act was:

> *Provided however* that the right to the use of water by the person so constructing the same [diversion works], on or to any tract of desert land of six hundred forty acres shall depend on bona fide prior appropriation, and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon public lands not navigable shall remain and be held for the appropriation and use of the public for irriga-

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151 Prescriptive periods and rights vary according to state law: Arizona, 5 years, Rev. Code 1928, § 3280; California, 3 years, Deering's Gen. Laws 1937, act 9091, § 20a; Idaho, 5 years, Code Ann. 1932, § 41-216; Kansas, no prescriptive period, but failure to use continually and beneficially with cause or transfer is deemed abandonment and surrender, Gen. Stats. Ann. 1935, §§ 42-308, 42-314; Montana, abandonment is a question of fact for the jury, Thomas v. Ball, 66 Mont. 161, 213 Pac. 597 (1923); Nebraska, three years, Comp. Laws 1929, § 81-6309; Nevada, five years, Comp. Laws 1929, § 7897; New Mexico, four years, with water for storage in reservoirs excepted, Ann. Stats., Comp. 1929, § 151-154, ground water, 138 Supp. to Stats. Ann., § 151-208; Oklahoma, two years, Stats. Ann. 1936, t. 82 § 32; Oregon, five years, inapplicable to municipalities, Code Ann. 1930, § 47-901; South Dakota, three years, Code 1939, § 61.0139; Texas, three years, Vernon's Tex. Stats., Rev. Civ. Stats. 1936, art. 7544; Utah, five years, Rev. Stats. 1933, § 100-1-4, as amend. Laws 1939, ch. 11; Wyoming, five years, Stats. Ann. 1935, ch. 90 § 198.

152 In such cases the right would revert to the state and logically there could be no adverse possession as against the sovereign.

153 19 Stat. 377 (March 3, 1877).

154 26 Stat. 1096, 1097 (March 3, 1891).

tion, mining and manufacturing purposes subject to existing rights.[155]

Although this was not the first Federal statute recognizing the western doctrine of appropriation,[156] it vastly reduced the land to which the riparian doctrine could have applied. In the state courts there was immediate dispute as to whether the statute was limited only to desert lands [157]or to all public lands in the named states.[158] This was not finally settled until 1935, in *California-Oregon Power Co. v. Beaver Portland Cement Co.*,[159] where the Supreme Court held it applicable to all public lands in the named states and territories, and declared that it served the water from the land, leaving unappropriated waters of non-navigable sources open to appropriation under the laws of the named states. Thus, this case reaffirmed statements by earlier courts that the determination of the system to govern water rights was left to each state.[160]

(1) *State Interpretation — "The Colorado Doctrine"*

In the interim two divergent theories of the act's effect on the riparian doctrine had arisen. Following the line of reasoning of the Colorado court in *Coffin v. Left Hand Ditch Co.*,[161] Arizona, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming repudiated the riparian doctrine in toto. The "Colorado doctrine" starts with the assumption that all water in natural streams, and in some other sources, is the property of the state; that the doctrine of riparian rights is unsuited to the semiarid conditions of the state and never obtained there; that the United States in proprietary capacity had no rights not accorded to private landowners, and therefore no patentee from the United States could obtain riparian rights; consequently the right of water use is obtainable only by appropriation under state law.[162]

(2) *The "California Doctrine"*

On the other hand many of the western states recognize the coexistance of the two doctrines, usually with the effect that appropriative rights limit and restrict riparian rights. These states follow the "California doctrine," expressed in *Lux v. Haggin*,[163] which begins with the thesis that the right to appropriate water on public domain was derived not from the state but from the United States as landowner; this grant was later confirmed by legislation, and prior appropriations under the Desert

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[155]19 Stat. 377 (March 3, 1877).

[156]15 Stat. 253 § 9; U. S. Rev. Stats, § 2339 (July 26, 1866) recognized local customs in regard to appropriation for agricultural, manufacturing and mining purposes on lands in the public domain, as against the United States. 16 Stat. 218; U. S. Rev. Stats. § 2340 (July 9, 1870), amending the Act of 1866, provided that all patents on public lands thereafter granted were subject to vested or accrued water rights under the act of 1866.

[157]San Joaquin & King's River C. & Irr. Co. v. Worswick, 187 Cal. 674, 203 Pac. 999 (1922); Still v. Palouse Irr. & Power Co., 64 Wash. 606, 17 Pac. 466 (1911).

[158]Hough v. Porter, 51 Oreg. 318, 102 Pac. 728 (1909).

[159]295 U. S. 142 (1935).

[160]Kansas v. Colorado, 206 U. S. 46 (1907); Wyoming v. Colorado, 259 U. S. 419 (1921).

[161]6 Colo. 443 (1882).

[162]I Wiel, Water Rights in the Western States 173-228 (3d ed.)

[163]69 Cal. 255, 4 Pac. 919 (1884).

Land Act were upheld against subsequent grantees of the land; but as a right to the unappropriated water was not reserved by the United States, it passed with the title, and this right is superior to subsequently acquired appropriations.[164]

States following the "California doctrine" in regard to lands in the public domain after 1877 or to state lands after the passage of state statutes dedicating water to the public use[165] have consistently held that these acts could not operate in derogation of vested riparian rights, and as riparian rights vest with the patent, and are not subject to loss by non-use, this applies to all lands patented before passage of the act. After the inception of the appropriative doctrine the time of the acquisition of the appropriative right of the patent determined the superiority of title as between appropriators and riparians, though there is no question of priority of time between riparians.[166] Under this doctrine it may be seen that both types of water rights are equally entitled to protection of law and where there is conflict the courts will make adjustments in specific instances. As this is the situation which will obtain in Mississippi an examination of the correlation of riparian and appropriative rights in each of the states following the "California doctrine" should be made.

(3) *Divergencies Under the California Doctrine*

In California riparian rights which vested by ownership of the land before the passage of the Desert Land Act and rights in *unappropriated* waters on lands patented after its passage accrue at the date of purchase.[167] Riparian rights are subject to appropriative rights which vested and accrued prior to the entry on public lands[168] and this applies even where the appropriation was upstream from the subsequently acquired riparian land. However, an appropriation on *private* land gives no right as against a subsequent riparian purchaser above the point of diversion, so no actual exercise of the riparian right is necessary to give it priority to an appropriation on private lands.[169] The 1928 constitutional amendment has limited all water rights to reasonable beneficial uses under reasonable methods of diversion, and this controls both appropriative and riparian rights.[170] The riparian right is paramount, but all streams are subject to appropriation, and when the right has been determined and limited under the amendment the riparian cannot enjoin an appropriation of any part of the excess water.[172] The courts may call

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164I Wiel, op. cit. supra.

165Deering's Gen. Laws Cal. 1937, Act 9091, § 11; Kan. Laws 1945, ch. 390, Gen. Stats. 1949, §§ 82a-701 to 82a-722; Neb. Const. Art. XV §§ 5, 6; N. Dak. Comp Laws 1913, § 8235, as amended. Laws 1939, ch. 225; Oreg. Code Ann. 1930, § 47-401, Code Ann. Supp. 1935, § 47-1302; S. Dak Code 1939, § 61.0101; Vernon's Tex. Stats. 1936, Rev. Civ. Stats., art. 7467; Rem. Rev. Stats. Ann. (Washington) 1931, § 7351.

166Peabody v. Vallejo, 2 Cal.2d 351, 40 P.2d 486 (1935); Crawford v. Hathaway, 67 Nebr. 325, 93 N.W. 781 (1903); Motl v. Boyd, 116 Tex. 82, 286 S.W. 458 (1926).

167Peabody v. Vallejo, supra note 166.

168Haight v. Costanich, 184 Cal. 426, 194 Pac. 26 (1920).

169San Joaquin & Kings River C. & Irr. Co. v. Worswick, 187 Cal. 674, 203 Pac. 999 (1922).

170See notes 53-55 supra.

171Duckworth v. Watsonville Water & Light Co., 150 Cal. 520, 89 Pac. 338 (1907).

172Meridian v. San Francisco, 13 Cal. 2d 424, 90 P.2d 537 (1939).

on the state administrative agency for expert assistance in adjudication of rights.[173]

Nebraska, Oregon, and Kansas water law seems to be an amalgam of the California and Colorado doctrines, though in all three states riparian rights have been reduced to a minimum. Nebraska is not one of the states named in the Desert Land Act, but under the authority of *U. S. v. Rio Grande Irrigation Co.*[174] the court held that its irrigation act, which abrogated the riparian doctrine, was constitutional.[175] However, this case also declared that the act applied only to unappropriated waters, and not to those subject to riparian rights prior to the passage of the act, and that the latter could only be taken by statutory condemnation. As the only riparian rights recognized are those which accrued before 1889, and as the court has allowed only damages and not an injunctive remedy to riparians injured by appropriators, it is apparent that riparian rights are not valuable in Nebraska.[176] In *Hough v. Porter*[177] the Oregon court declared that the Desert Land Act abrogated riparian rights in public lands entered after March 1, 1877, except where essential for domestic uses and stock watering; thus riparian rights exist in lands patented before the act. The 1909 Water Code limited "vested" riparian rights, to which appropriative rights were subject, to actual application of water to beneficial use prior to the passage of the act or within a reasonable time thereafter by works then under construction.[178] The act was attacked as a violation of the United States Constitution in *California-Oregon Power Co. v. Beaver-Portland Cement Co.*,[180] but as the Supreme Court rested its decision on the ground that the Desert Land Act left the decision of what water law was applicable to the named states, a direct decision on such a provision has not been made. The Water Code has been held to be the exclusive means for acquiring a water right.[181] Therefore, in Oregon, because of the "waiver theory," there has been a virtual abrogation of the riparian doctrine in litigation between riparian and appropriative claimants. Kansas also was not named in the Desert Land Act, and for years the riparian doctrine was paramount[182] even though there was statutory provision for appropriation.[183] In 1945, in response to the difficulty of administering the conflicting water rights, the legislature passed a water law similar to the Oregon Water Code of 1909, defining protected vested riparian rights in much the same manner, dedicating all water to the public use, and making the statutory method for acquisition of rights exclusive.[184] This act was held constitutional in *State ex rel.*

173Meridian v. San Francisco, supra note 172; Tulare Irr. Dist. v. Lindsay Strathmore Irr. Dist., 3 Cal.2d 489, 45 P.2d 972 (1935).

174174 U. S. 690 (1899).

175Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903).

176McCook Irrigation & Water Power Co. v. Crews, 70 Neb. 115, 102 N.W. 249 (1905); Cline v. Stock, 71 Neb. 70, 98 N.W. 454 (1905).

17751 Oreg. 318, 102 Pac. 728 (1909).

178Now Oreg. Code Ann. 1930, § 47-403.

179In re Hood River, 114 Oreg. 112, 227 Pac. 1065 (1924).

180295 U. S. 142 (1935).

181Oreg. Code Ann. 1930 §§ 47-401, 470402, Code Ann. Supp. 1935, § 47-1302.

182Heise v. Schultz, 167 Kan. 34, 204 P.2d 706 (1949); Frizell v. Bindley, 144 Kan. 84, 58 P.2d 95 (1936); Emporia v. Solden, 25 Kan. 588 (1881).

183Kan. Laws 1917, ch. 172, Gen. Stats. Ann. 1935, §§ 24-901 to 24-905, 42-103.

184Kan. Laws 1945, ch. 390, Gen. Stats. 1949, §§ 82a-701 to 82a-722.

Emery v. Knapp,[185] but it should be noticed that although the court based its decision on the dedication clause[186] the court placed great emphasis on the fact that the claimant of the riparian right was in conflict with appropriative claimants of flood waters stored in the Harland Dam under federal legislation[187] and a federally sanctioned Colorado-Kansas-Nebraska Republican River Company.[188] The Kansas statute has not been before the United States Supreme Court.

Although the appropriative doctrine is recognized by the North Dakota constitution and by statute,[189] in *Bigelow v. Draper* the court held that since riparian rights as applied to non-navigable streams were recognized in the Dakota Territory when the state constitution was adopted, riparian proprietors were invested with property rights in the beds of all natural watercourses and in the water itself, which were under the protection of section fourteen of the constitution and could not be divested by section two hundred ten of the constitution.[190] This case also held that riparian rights are property, real estate, which could not be condemned without also taking the fee to the land underlying the watercourse.

The first Oklahoma territorial legislature passed a statute, copied from the Dakota Territorial law,[191] giving the landowner the right to use the stream flow as long as it remained on his land.[192] In 1897 a statute, declaring unappropriated water of streams and storm and flood waters in areas in which irrigation was beneficial to be public property subject to appropriation, provided for condemnation of private lands including "waters of riparian owners."[293] Under the present statute beneficial use is declared "the basis, measure and limit of the right to use water."[194] However, this statute has not yet been construed, and as riparian rights have been declared paramount in Oklahoma, it would seem that the statute will do nothing to change this situation.

The South Dakota court followed Oregon[195] in the 1922 case of *Cook v. Evans,* declaring that a riparian owner must establish his claim by proof of settlement of the land before March 3, 1877, or lose his alleged riparian rights under the appropriation statute.[196] After the

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185167 Kan. 546, 207 P.2d 440 (1949).

186Kan. Gen. Stats. 1949, § 82a-702.

18758 Stat. 887 (Dec. 22, 1944). See 43 U.S.C. § 371.

188Kan. Gen. Stats. 1947 Supp., § 82a-518.

189N. Dak. Const. Art. § 210; N. Dak. Comp. Laws 1913, §§ 5341, 8235, as amend. Laws 1939, ch. 225, 8271-8274, 8297. §§ 8271-8274 provide "the flood waters of any draw, coulee, stream or watercourse, having a flow of not to exceed 1/3 of 1 cubic foot of water per second during the greater part of the year" may be appropriated by filing a location certificate with the State Engineer and securing a permit. This is commonly called the "dry draw" provision. § 8297 provides for appropriation of seepage water from constructed works. N. Dak. Laws 1939, ch. 256 provides that appropriation under the code is exclusive, and the granting of water rights to any person by the state engineer is subject to approval of the Commission. All claimants are made parties to adjudicated suits.

190N. Dak. 152, 69 N.W. 570 (1896).

191Terr. Dak. Civ. Code § 225 (1886).

192Now Okla. Stats. Ann. 1936, t. 60 § 60.

193Okla. Laws 1909, § 3918.

194Okla. Stats. Ann. 1936, t. 82 § 1.

195Hough v. Porter, 51 Oreg. 318, 102 Pac. 728 (1909).

196Coob v. Evans, 45 S. Dak. 43, 186 N.W. 571 (1922).

California-Oregon Power Co.[197] case South Dakota reversed its ground, holding that the true interpretation of the Desert Land Act could not have been made until the United States Supreme Court passed on it, and that *Cook v. Evans* did not create an established rule of property.[198]

The decisions prior to *Cook v. Evans* were reinstated and riparian rights were again considered paramount.[199] Therefore, as against a subsequent appropriator a riparian has the right to use all the water necessary and proper for the irrigation of his land, and needs no permit water.for the use of water, while the appropriator's only remedy is against waste.[200] Neither a riparian nor an appropriator may claim more water than he actually uses for reasonable, beneficial purposes, without unnecessary interference in the rights of others.[201] The South Dakota statute provides that when any action for determination of rights has begun, the court shall request the state engineer to provide a complete hydrographic survey, with funds available from a legislative appropriation.[202] Another provision allows appropriation for irrigation and stock watering from any "dry Draw" or watercourse not having a flow of at least two miner's inches during the greater part of a year, by filing a location plat and receiving a permit. Such a right is not under the rules and regulations, nor subject to the jurisdiction of the state engineer, but a certificate covering the appropriation may be secured on petition.[203] However, the state engineer has control of "all waters of definite streams so far as they relate to irrigation or other riparian rights,"[204] and may appoint water commissioners for the distribution of water whenever in his judgment or that of a court of competent jurisdiction, and after consultation with the water users, this appears necessary.[205]

In Washington the Desert Land Act was held to apply only to desert lands, and did not affect water rights on public lands not entered under that act,[206] although the state waived its own riparian rights as proprietor of school lands, for the purpose of irrigation, when these were patented riparian rights vested in the purchasers.[207] However, riparian rights are limited by the necessity of beneficial use, and no relief is granted unless a riparian is substantially damaged.[208] Between riparians and appropria-

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197295 U.S. 142 (1935).

198Platt v. Rapid City, 291 N.W. 600 (S. Dak. 1940).

199St. Germaine Irr. Ditch Co. v. Hawthorn Ditch Co., 32 S. Dak. 260, 143 N.W. 124 (1913); Lone Tree Ditch Co. v. Cyclone Ditch Co., 26 S. Dak. 466, 128 N.W. 702 (1910).

200St. Germaine Irr. Ditch Co. v. Hawthorne Ditch Co., supra note 199. After this case "Subject to vested rights" was added to the provision that permits were mandatory before water could be used. See S. Dak. Code 1939, § 61.0101.

201Redwater Land & Canal Co. v. Reed, 26 S. Dak. 466, 128 N.W. 702 (1910).

202S. Dak. Code 1939, § 61.0119. The 1913 code placed all costs, including that of the survey, on the litigants. In St. Germaine Irr. Ditch Co. v. Hawthorne Ditch Co. 32 S. Dak. 260, 143 N.W. 124 (1919) this was held void as an unconstitutional deprivation of property without due process of law. Now although court costs are chargeable to litigants in proportion to their water rights, the cost of the survey is paid by the state.

203S. Dak. Code 1939, §§ 61.0133, 61.0146.

204Id. §§ 61.0104, 61.0105.

205Id. § 61.0121.

206Still v. Palouse Irr. & Power Co., 64 Wash. 117 Pac. 466 (1911).

207In re Doan Creek, 125 Wash. 14, 215 Pac. 343 (1923).

208Brown v. Chase, 125 Wash. 542, 217 Pac. 23 (1923).

tors the first who secures his right has priority.[209] To be protected, a riparian must show that he will make a present or immediately future beneficial use of the water.[210]

In Texas there is some question as to when the appropriation statute became effective as against riparian claimants. The present statute states that nothing shall be construed as recognizing riparian rights in the owner of *any* land patented after July 1, 1895,[211] but there is some conflict, as both the 1899 and 1895 acts applied only to the *arid* portions of the state.[212] The statute provides only one method for the acquisition of an appropriative right, and this has been held to be exclusive.[213]

The 1917 act created the Board of Water Engineers, giving them power, on petition of any water user, to make an adjudication of rights which were in full force pending determination on appeal. The appropriative doctrine suffered when this was declared an unconstitutional delegation of judicial powers to an executive branch.[214] Although the "conservation amendment" of 1919 was held to make constitutional such powers over oil and gas litigation in the Railroad Commission,[215] the provisions of the 1917 act were omitted from the 1925 revised civil statutes, and have not been reinstated.[216] Another limitation on appropriative rights was the decision that, although the appropriation statute provides that by three years use title to unappropriated waters may be acquired,[217] on authority of *Motl v. Boyd*[218] "unappropriated waters" does not include riparian waters, and that an appropriator upstream from a riparian must show ten years adverse use under the general statute of limitations.[219] However, a riparian cannot enjoin an appropriation which does not injure him.[220] This case also expressly denied application of the "Oregon waiver theory" in Texas, holding that a riparian can assert both riparian and appropriative rights.

B. *Appropiable Water*

Appropriative rights must also be adjusted to the rights of claimants to the different classes of water. In states following the "Colorado doctrine", denying riparian rights, this means only those landowners having claims on the incidents of watercourses, such as sources, tributaries and ground water. These problems are also faced in jurisdictions where both doctrines exist, but with the added problem of correlating the rights of riparians, appropriators and non-riparian landowners.

At the outset it should be noted that appropriative rights attach

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[209]In re Sinlajekin Creek, 162 Wash. 635, 299 Pac. 649 (1931); In re Alpowa Creek, 129 Wash. 9, 224 Pac. 29 (1924).

[210]State v. American Fruit Growers, 135 Wash. 156, 237 Pac. 498 (1925).

[211]Vernon's Tex. Stats. 1936, Rev. Civ. Stats, art. 7492. See Tex. Laws 1917, ch. 88.

[212]Tex. Gen. Laws 1895, ch. 21, p. 21.

[213]Biggs v. Miller, 147 S.W. 632 (Tex. Civ. App. 1912).

[214]Board of Water Engineers v. McKnight, 111 Tex. 82, 229 S.W. 301 (1921).

[215]Texas Const. Art XVI, § 59a. Corzelius v. Harrell, 143 Tex. 509, 186 S.W.2d 961 (1945). See Clark v. Briscoe Irr. Co., 200 S.W.2d 674 (Tex. Civ. App. 1947).

[216]Vernon's Tex. Stats. 1936, Rev. Civ. Stats., Final Title, § 2, p. 1569.

[217]Vernon's Tex. Stats. 1936, Rev. Civ. Stats., art. 7596.

[218]116 Tex. 82, 286 S.W. 458 (1926).

[219]Matagorda Canal Co. v. Markham Irr. Co., 154 S.W. 1176 (Tex. Civ. App. 1912).

[220]Biggs v. Lee, 147 S. W. 709 (Tex. Civ. App. 1912); Biggs v. Leffingwell 62 Tex. Civ. App. 665, 132 S.W. 902 (1910).

only to public waters or waters declared appropriable by statute. The same definitions determining watercourses obtain in both the riparian and appropriative doctrines.[221] Thus, except in the fringe areas, it is apparent that no problems arise concerning the use of watercourse water in "Colorado doctrine states." In "California doctrine states" however, several present themselves. In many of these states "all water" has been dedicated to the public use by statute[222] but this declaration has been limited either by later statute or by judicial decision. Thus, in Washington appropriative rights are recognized only in navigable streams,[223] while in South Dakota the statute excepts navigable waters from appropriation.[224] In Texas under the appropriation statute it has been held that an appropriator may take water from the normal flow only if it does not injure a riparian proprietor.[225]

Generally there is no appropriative right in diffused surface water in the absence of a statute authorizing its appropriation.[226] With the exception of South Dakota[227] the statutes dedicating "all waters" to the public use have been held to include diffused surface water,[228] although there are qualifications in some due to "subject to existing rights" clauses.[229] In states where watercourses are appropriable the courts have been astute to hold that appropriators cannot be denied use of tributary diffused surface water, but without such a statute it is generally held that it belongs to the landowner.[230]

221See notes 30-32 supra.

222Cal. Civ. Code § 1410, Cal. Stats. 1913, ch. 586, § 11, as amned. by Stats. 1923, ch. 62; Deering's Gen. Laws 1937, Act 9091, § 11; Nev. Comp Laws 1929, § 7890; N. Dak. Comp. Laws 1913, § 8235, as amend. Laws 1939, ch. 255; Oreg. Code Ann. 1930, § 47-401; S. Dak. Code 1939, § 61.0101; Utah Rev. Stats. 1939 § 100-1-1 as amended by Laws 1935, ch. 105; Wash. Rem. Rev. Stats. Ann. 1931, § 7351.

223State ex rel. Ham, Yearsley & Ryrie v. Superior Court, 132 Wash. 255, 231 Pac. 946 (1925).

224S. Dak. Code 1939, § 61.0101. "Navigable" is defined as those streams more adapted to public than private use, such as fishing, fowling, boating as well as commercial uses. Hillebrand v. Knapp, 65 S. Dak. 414, 274 N.W. 821 (1937); Anderson v. Ray, 37 S. Dak. 17, 156 N.W. 591 (1916).

225Houston & Texas Cent. Ry. v. East, 98 Tex. 146, 81 S.W. 279 (1904).

226III Farnham, The Law of Water Rights, § 2572 (1911); I Kinney, A Treatise on the Law of Irrigation and Water Rights, 518 (2d ed. 1912).

227In the light of Terr. Dak. Code Civ., § 255 (appr. Jan. 12, 1866) this statute was declared unconstitutional regarding vested rights to water. St. Germaine Irr. Ditch Co. v. Hawthorne Ditch Co., 32 S. Dak. 260, 143 N.W. 124 (1913). The South Dakota Court has also declared water in a channel, not constituting a definite stream, may not be appropriated under the "dry draw" provision of this act, as such water "belongs" to the landowner. Benson v. Cook, 47 S. Dak. 611, 201 N.W. 562 (1924).

228See Newton v. Weiler, 87 Mont. 164, 286 Pac. 133 (1930); Richlands Irr. Co. v. Westview Irr. Co., 96 Utah 403, 80 P.2d 458 (1938).

229Haver v. Motonock, 79 Colo. 194, 244 Pac. 914 (1926); Henriot v. Paulson, 134 Oreg. 222, 293 Pac. 424 (1930). In some states the "existing rights" clause applied only where the diffused surface water or spring water is not tributary to an appropriable stream. La Jara Creamery & Line Stk. Co. v. Keller, 35 Colo. 105, 83 Pac. 914 (1906); Henriot v. Paulson, supra.

230McClellan v. Hurdle, 3 Colo. App. 430, 33 Pac. 280 (1893); Josslyn v. Daly, 17 Idaho 137, 96 Pac. 568 (1908); Straight v. Brown, 16 Nev. 317 (1881); Holman v. Christensen, 73 Utah 389, 274 Pac. 457 (1929); Ryan v. Tutty, 13 Wyo. 122, 78 Pac. 661 (1904). However, although Vernon's Tex. Stats. 1936, Rev. Civ. Stats. art. 7492 authorizes the appropriation of storm, flood or rain waters in any watercourse, canyon, ravine, depression or watershed — and this literally would seem to include diffused surface water — the Texas court held that the statute did not apply to existing rights

Appropriative rights attach to definite underground streams by statute in Arizona, California, Idaho, Kansas, Nevada, New Mexico, Texas (the underflow of streams), and Utah, and by decision in Colorado, Montana, Oregon and Washington.[231] In North Dakota, Oklahoma and South Dakota statutes provide that underground streams may be used by the landowner, but he may not prevent their natural flow.[232] In Wyoming although there is neither statute nor decision concerning underground streams, it may be assumed that they are appropriable under the constitutional declaration that "all streams" are appropriable.[233]

Percolating waters tributary to a watercourse are generally appropriable,[234] though there are some exceptions;[235] those which do not or will not reach a watercourse are not.[236] Generally natural springs are subject

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in landowners so long as the rain water remained on their land and did not enter a watercourse to which riparian rights attached. Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S.W. 221 (1936).

[231]Ariz. Rev. Code 1928, § 3280; Maricopa County Municipal Water Conserv. Dist. No. 1. v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369 (1931); Cal. Civ. Code, § 1410; Cal. Cost. Art XIV. § 3 (Nov. 6, 1928 amendment); Hanson v. McCue, 42 Cal. 303 (1871); Platte Valley Irr. Co. v. Buckers Irr., Mill & Impr. Co., 25 Colo. 77, 53 Pac. 334 (1898); Idaho Code Ann. 1932 § 41-101; Public Utilities Comm'n v. Natatorium Co., 36 Idaho 287, 211 Pac. 533 (1922); Kan. Laws 1945, ch. 390, Gen. Stats. 1949 § 82a-701 to 82a-722; Emporia v. Soden, 25 Kan. 588 (1881); Ryan v. Quinlan, 45 Mont. 521, 124 Pac. 512 (1912); Nev. Sess. Laws 1939, ch. 178; Strait v. Brown, 16 Nev. 317 (1881); N. Mex. Const. Art. XVI §§ 1, 3; N. Mex. 1938 Supp. to Stats. Ann., §§ 151-200 to 151-212; El Paso & R.I. Ry. v. District Court, 36 N. Mex. 94, 8 P.2d 1069 (1931); Oreg. Code Ann. 1930, § 47-1301 ("all underground waters" of the state of Oregon in the counties east of the summit of the Cascade Mountains); Hayes v. Adams, 109 Oreg. 51, 218 Pac. 933 (1923); Vernon's Tex. Stats. 1936, Rev. Civ. Stats. art. 7467; Motl v. Boyd, 116 Tex. 82, 286 S.W. 458 (1926); Utah Const. Art. XVII, § 1; Utah Rev. Stats. 1933, § 100-1-1, as amended by Laws 1935, ch. 105; Crescent Mining Co. v. Silver King Mining Co., 17 Utah 444, 54 Pac. 244 (1898); Wash. Rem. Rev. Stats. 1931, § 7351; Meyer v. Tacoma Light & Water Co., 8 Wash. 144, 35 Pac. 601 (1894).

[232]See notes 58, 59 and 60 supra.

[233]Wyo. Const. Art. VIII, § 1.

[234]Faden v. Hubbell, 93 Colo. 358, 28 P.2d 247 (1933); Hinton v. Little, 50 Idaho 371, 296 Pac. 592 (1931) (all groundwaters are appropriable); In re Manse Spring and its Tributaries, 60 Nev. 280, 108 P.2d 311 (1940) (all groundwaters appropriable); El Paso & R.I. Ry. v. District Court, 36 N. Mex. 94, 8 P.2d 1064 (1931) (if groundwaters are in reasonably ascertainable boundaries); Boyce v. Cupper, 37 Oreg. 256, 61 Pac. 643 (1900) (re: springs in eastern part of state).

[235]Percolating waters belong to the landowner, Maricopa Municipal Water Conservation Dist. No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369 (1931); they belong to the landowner but this is subject to the rule of reasonable use in California, Peabody v. Vallejo, 2 Cal.2d 351, 40 P.2d 486 (1935), and all rights, surface and subterranean in waters which form part of the common supply are correlated. Lodi v. East Bay Municipal Utility Dist., 7 Cal.2d 681, 76 P.2d 681 (1936); Ryan v. Quinlan, 45 Mont. 521, 124 Pac. 512 (1912). Groundwater appropriable if within reasonably ascertainable boundaries. El Paso & R.I. Ry. v. District Court, 36 N. Mex. 94, 8 P.2d 1064 (1934). Not appropriable in western part of state. Taylor v. Welch, 6 Oreg. 198 (1876); Houston & Texas Cent. Ry. v. East, 98 Tex. 146, 81 S.W. 458 (1916). Groundwater presumed to be percolating and to belong to landowner, but rights are not apportionable between landowners, Evans v. Seattle, 182 Wash. 450, 47 P.2d 984 (1935).

[236]Emporia v. Soden, 25 Kan. 588 (1881); Vanderwork v. Hewes, 15 N. Mex. 439, 110 Pac. 567 (1910); Cities Service Gas Co. v. Eggers, 186 Okla. 466, 98 P.2d 1114 (1940); springs fed by such percolation belong to the landowner, Metcalf v. Nelson, 85 S. Dak. 87, 65 N.W. 911 (1895); the adjoining landowner cannot cut off the supply, Madison v. Rapid City, 61 S. Dak. 83, 246 N. W. 283 (1932); Bining v. Miller, 55 Wyo. 415, 102 P.2d 54 (1940).

to appropriation where specifically provided by statute[237] or if "all waters" have been dedicated, this having been held applicable to spring water.[238] Springs which constitute the source of watercourses are subject to appropriation,[239] but those which do not flow outside the boundaries of the tract on which they are located are not generally appropriable.[240] Prior appropriations from springs on public lands of the United States have been protected against purchasers under the Desert Land Act.[241] In California and Washington the rule of reasonable use demands a correlation of the rights of landowners overlying percolating source waters of a spring with the rights of the owner of the land where the spring arises.[242]

Several statutes allow appropriation of waste and seepage water before it has returned to the watercourse from whence originally diverted.[243] In the absence of such statute no appropriative right in waste or seepage water arises.[244] However, this is not a true appropriation as the first user may do all in his power to prevent waste and subsequent users cannot compel continuance of waste.[245] Seepage becomes part of the stream into which it flows if there is no intent on the part of the appropriator to recapture it.[246] In some states the appropriative right attaches only to natural increases in stream flow,[247] while in others the right to use the

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[237]Ariz. Rev. Code 1928, § 3280 "Surface springs"; "springs and natural flowing springs," Colo. Stats. Ann. 1935, ch. 90, §§ 20, 21; "springs and natural springs," Idaho Code Ann. 1932, §§ 41-101, 41-103, 41-107; "all springs" Mont. Rev. Code 1935, § 7093; "natural springs" Wyo. Const. Art VIII, §§ 1, 3. In South Dakota landowners on whose land a natural spring arises to feed a watercourse, may appropriate. S. Dak. Code 1939, § 61.0101.

[238]As in Nevada, North Dakota, Oregon, South Dakota, Utah and Washington, see Hutchins, Problems in the Law of Water Rights in the West 266 (1942).

[239]Hutchins, id. at 267. By statute Kansas, Oklahoma and North Dakota are exceptions to this rule. However, in dicta the Kansas court said that where such springs are the source of a watercourse, the watercourse begins at that point. Rait v. Furrow, 74 Kan. 101, 85 Pac. 934 (1906).

[240]See Colo. Comp. Laws 1921, § 1637; Colo. Stats. Ann. 1935, ch. 90, § 20; Oreg. Code Ann. 1930, § 47-1491; S. Dak. Code 1939, § 61.0101; Ariz. Rev. Code 1928, § 3280 was held an exception to this rule in Foruzan v. Curtis, 43 Ariz. 140, 29 P.2d 722 (1934). The Wyoming appropriation provision in the constitution, Art. VIII, §§ 1, 3, though exceptions to the rule, apply only to natural and not artificial springs, Hunt v. Larmie, 26 Wyo. 160, 181 Pac. 137 (1919).

[241]19 Stat. 377, March 3, 1877; Le Quine v. Chambers, 15 Idaho 405, 98 Pac. 415 (1908); Geddis v. Parrish, 1 Wash. 587, 21 Pac. 314 (1889).

[242]Cohen v. La Canada Land & Water Co., 142 Cal. 437, 76 Pac. 47 (1904); Evans v. Seattle, 182 Wash. 450, 47 P.2d 984 (1935).

[243]See, e.g., Colo. Stats. Ann. 1935, ch. 90, § 20; Idaho Code Ann. 1932, § 41-107. Upholding such statutes as constitutional, see Nevius v. Smith, 86 Colo. 178, 279 Pac. 44 (1929); Breyer v. Baker, 31 Idaho 387, 171 Pac. 1135 (1918).

[244]Binning v. Miller, 55 Wyo. 451, 102 P.2d 54 (1940).

[245]Lambye v. Garcia, 18 Ariz. 178, 157 Pac. 977 (1916); Sebern v. Moore, 44 Idaho 410, 258 Pac. 176 (1927); West Side Ditch Co. v. Bennett, 106 Mont. 422, 78 P.2d 78 (1938); Ryan v. Gallio, 52 Nev. 330, 286 Pac. 963 (1930).

[246]Marks v. Hilger, 262 Fed. 302 (9th Cir. 1920); Woolman v. Garringer, 1 Mont. 535 (1872); Brosman v. Boggs, 101 Oreg. 472, 198 Pac. 890 (1921).

[247]Beaverhead Canal Co. v. Dillon Electric Light & Power Co., 34 Mont. 135, 85 Pac. 880 (1906).

portion of stream flow salvaged by artifical improvements belongs to the improver, or the one who developed the new supply.[248]

C. *Summary*

To conclude the analysis of the correlation of doctrines, it might be wise to quote from a distinguished authority on water law, Mr. Wells Hutchins:

> The result of this conflict of rights, in a jurisdiction in which both the riparian and appropriation doctrines are recognized, but in which the riparian doctrine is the paramount rule and rights thereunder are protected to the extent that they are in California, is that the riparian right attaches to a tract of land at the time such land passes to private ownership; such right is inferior to an appropriative right previously acquired in public land; but as to appropriative rights to waters in a stream subsequently initiated, the riparian right is superior. Once the riparian right has vested in a particular tract it obviously cannot be destroyed by a later statutory appropriation. Appropriators thereafter take only at the sufferance of the holders of established riparian rights; the later appropriator may use water to which the riparian owner is entitled, but only during the periods in which the riparian does not choose to make use of it. That is, while a late appropriative right may be enriched by reason of the abandonment of an early appropriative right or a failure on the part of an early appropriator to use the water for a period of years prescribed by statute, it is not enriched as the result of the failure of a riparian owner to exercise his riparian right, for a riparian right is not destroyed by nonuse. It is true that an appropriator may acquire a prescriptive right as against a riparian owner by virtue of upstream diversion which actually deprives the riparian of water to which he is entitled, but that involves an entirely different legal principle; if the appropriator's diversion is downstream from the riparian land, his use is not actually adverse to the riparian owner's possible use, and in such case he cannot acquire a prescriptive right. The point is that aside from the interposition of some rule affecting the loss of property rights in general, such as prescription, the riparian right is (1) coordinate with the rights of other riparian owners, (2) subordinate to appropriate rights previously acquired on public lands, and (3) paramount to appropriative rights subsequently acquired.[249]

IV. Riparian Rights in Mississippi

Mississippi water law has been primarily concerned with drainage, flood control, navigation, and pollution, and there has been little empha-

[248]Ripley v. Park Center Land & Water Co., 40 Colo. 129, 90 Pac. 75 (1907); Nampa & Meridian Irr. Dist. v. Welch, 52 Idaho 279, 15 P.2d 617 (1932); Big Cottonwood Ditch Co. v. Shurtliff, 56 Utah 196, 189 Pac. 587 (1920). The burden of proof lies with the person claiming to have developed the increase. Spaulding v. Stone, 46 Mont. 483, 129 Pac. 327 (1912).

[249]Hutchins, Problems in the Law of Water Rights in the West 33-34 (1940).

sis on beneficial use of water. However, the courts have definitely expressed a modified riparian doctrine, and the rights which have arisen are firmly established by the practices of agricultural, industrial, and municipal groups in the state. As early as 1844 the State Supreme Court gave full recognition to the riparian doctrine.[250] Following *Tyler v. Wilkinson*[251] at length, the court found that this doctrine had appertained to Mississippi from the time of its organization as a Territory in 1798. This landmark case held that the water of "fresh water rivers of whatever kind," as well as the soil beneath their surface, to the middle of the stream, belonged to the abutting landowner, although proprietors abutting the sea or tide water owned only to the high-water mark and had no property in the water itself.[252] Subsequent cases reiterated the doctrine applying it both to lakes and streams with the exception of a public right of way for navigation, though riparian rights were held not to apply if reserved to the sovereign in the patent.[253] The right was considered an incorporeal hereditament annexed to the freehold and protected by the due process clauses of the state and federal constitutions.[254]

In another early case the court defined "natural watercourse," to which these rights apply, as a natural channel, having defined bed and banks through which water is conveyed and discharged.[255] That water does not run through it constantly or that it is dry most of the year does not deprive it of this status. Subsequent cases have extended this to include channels with artificial origins which have been treated as natural watercourse for a considerable period of time. And once it has acquired the status of a natural channel, disrepair will not change its character.[256] But another case has held that before an artificial channel may be widened or deepened it must carry all the waters naturally and normally flowing in the stream.[257]

Many of the cases mentioned previously have stated the "natural flow" theory that the riparian has the right to the usual seasonal flow of water in its natural channel undiminished in quantity and unpolluted in quality. In Mississippi the "water power privilege" is recognized, so that the riparian may use in any way the difference in surface level of the water from the place where it first touches and where it leaves his

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[250]Morgan v. Reading, 3 Miss. 366 (1844).

[251]4 Mason 400, 13 Fed. Cas. 312 (1827).

[252]The Mississippi supreme court followed Lord Hale's distinction between "navigable" and "non-navigable" waters as being one of international maritime law unconnected with actual navigation. Thus "navigable waters" cease at the high tide mark.

[253]Anderson-Tully Co. v. Tingle, 166 F.2d 224 (5th Cir. 1948); Masonite Corp. v. Burnham, 167 Miss. 840, 146 So. 292 (1932); Richardson v. Sims, 118 Miss. 728, 80 So. 4 (1918); Pascagoula Boom Co. v. Dixon, 77 Miss. 593, 28 So. 724 (1899); Miss. Central RR. v. Mason, 51 Miss. 234 (1875); Evans v. Fisher, 40 Miss. 682 (1866); The Magnolia v. Marshall, 39 Miss. 109 (1860); Com'n. of Homochitto River v. Withers, 29 Miss. 33, 64 Am. Dec. 126 (1855).

[254]Miss. Central R.R. v. Mason, Supra note 253.

[255]Ferris v. Welborn, 64 Miss. 29, 8 So. 165 (1886).

[256]Pompey Lake Drainage Dist. v. McKinney Lake Drainage Dist., 136 Miss. 168, 99 So. 387 (1924).

[257]Scranton-Pascagoula Realty Co. v. City of Pascagoula, 157 Miss. 498, 128 So 73 (1930).

boundaries.[258] This type of case is more directly concerned with the beneficial use of water, while the other propounding the "natural flow" theory represent questions of pollution,[259] drainage,[260] or injury by water thrown back on an upper proprietor by dams or obstructions.[261] It should also be noted that the "water power privilege" is not set out as the only riparian right in Mississippi, but only as an instance of absolute right to use the water.

Actually, Mississippi law has greatly modified the riparian right. Primarily this has come about because previous water problems were concerned mainly with drainage, flood control and navigation, although some of the restrictions are peculiar to this jurisdiction. Unlike the ordinary riparian rule, when a stream leaves its natural channel and forms a new one in Mississippi the new riparian may erect barriers to turn the water back into the old channel, and does not have to clean out or restore the old channel to its former depth.[262]

Several problems have arisen in regard to the navigational policies of the state. By statute all rivers, creeks and bayous fifteen miles long and having a sufficient depth and width of water for thirty consecutive days in one year to float a steamboat capable of carrying 200 bales of cotton are navigable and declared to be public highways,[263] though under certain circumstances the board of supervisors of a county may declare a stream navigable.[264] Whether the declaration in such cases as *Morgan v. Reading*[265] that the soil is beneath the "navigable" waters of the state would divest riparians of their land to the middle of such streams might arise, but it is apparent that the statutes refer to navigation in its actual sense rather than the tide water — fresh water distinction. While the legislature can never under the Mississippi Constitution authorize any permanent obstruction of any of the navigable waters of the state it may provide for the removal of any of them.[266] By statute any person may enter and remove all obstructions in a navigable stream.[267] Thus, diversion works and dams for temporary detention and storage before use could be removed if they constituted obstructions.

The need for adequate handling of excess water has heretofore been a more serious problem in Mississippi, and drainage and flood control measures have been fostered on the local level by intricate statutes. The

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258Yazoo, & M.V. R.R. v. Brown, 99 Miss. 88, 54 So. 804 (1911); Liles v. Cawthorn, 78 Miss. 559, 29 So. 834 (1901); Miss. Central R.R. v. Mason, 51 Miss. 234 (1875).

259Southland Co. v. Aaron, 80 So.2d 823 (Miss. 1955); Masonite Corp. v. Steede, 21 So.2d 463 (1945). See note, 27 Miss. L. J. 151 (1956).

260Belzoni Drainage Com'n. v. Winn, 98 Miss. 359, 53 So. 778 (1910); Kansas City M. & B. R.R. v. Smith, 72 Miss. 677, 17 So. 78 (1895); Ferris v. Wellborn, 64 Miss. 29, 8 So. 165 (1886).

261Palmer v. Massengill, 214 Miss. 379, 58 So.2d 918 (1952); Liles v. Cawthorn, 78 Miss. 559, 29 So. 834 (1901).

262Yazoo & M.V. R.R. v. Brown, 99 Miss. 88, 54 So. 804 (1911).

263Miss. Code Ann. § 686 (1942).

264Id. § 8413.

2653 Miss. 366 (1844).

266Miss. Const. Art 4, § 81. This provision is especially applicable to railroads whose tracks cross a stream. See, e.g., New Orleans & N.E. R.R. v. Burdette, 183 So. 915 (Miss. 1938); Thompson v. Mobile, J. & K.C. R.R., 104 Miss. 651, 61 So. 596 (1913); Miss. & T. R.R. Co. v. Archibald, 67 Miss. 38. 7 So. 212 (1890); Miss. Central R.R. v. Carruth, 51 Miss. 77 (1875).

267Miss. Code Ann. § 8415 (1942).

natural flow theory has naturally been modified by the flood control theory of the state. Following the traditional riparian theory that flood waters which have left the banks of the stream and cover the land are vagrant flood waters, the Mississippi court has held that these are not regular waters of defined rivers and streams.[268] Both individual landowners and drainage districts may protect themselves with barriers if the works do not encroach on the natural bed of the watercourse, are built in conformity with existing police regulations, and are built to protect those erecting them and not to injure others.[269] Thus, under this theory a bayou connecting with the flooding river may be obstructed to the detriment of lower landowners on the river through an increase of floodwater,[270] and presumably, though the case has never been litigated, to the detriment of a lower proprietor on the bayou in depriving him of water. The courts in these cases do not conside the bayou, slough or depression as a watercourse, but say that it is a passageway for the vagrant flood waters or that it is not a running stream,[271] although this seems in conflict with the broad definition of "watercourse" in *Ferris v. Welborn*.[272] The burden of proving that there are vagrant flood waters or "extraordinary flood" lies with the party asserting them,[273] and in the construction of protective works they must exercise due care and adopt the method of construction, within the considerations of efficacy and expense, which will cause the least damage to others.[274] Thus, the rule of reasonable use has been applied to vagrant flood waters.

The need for local flood control has lead to the passage of intricate drainage district laws.[275] Flood control, drainage, and riparian rights come into focus especially when diffused surface water is discharged into watercourses for drainage purposes. Diffused surface water is defined as "those casual or vagrant suface waters which have not found their way into or become part of a well-defined stream and are not vagrant flood waters overflowing from the channels of rivers and spreading out over the countryside."[276] In the earliest cases Mississippi adopted the "common enemy" or common law rule by which a landowner could arrest or discharge for his own protection all such water which had not come to

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[268]Cubbins v. Miss. River Com'n., 241 U. S. 351 (1916); Indian Creek Droinage Dist. v. Garrott, 123 Miss. 301, 85 So. 312 (1920); Kansas City, M. & B. R.R. v. Smith, 72 Miss. 677, 17 So. 78 (1895).

[269]Cubbins v. Miss. River Com'n. supra note 268. Nor may the riparian complain of such acts by the federal government. Jones v. George, 126 Miss. 576, 89 So. 231 (1921).

[270]Indian Creek Drainage Dist. v. Garrott, 123 Miss. 301, 85 So. 312 (1920).

[271]Covington v. Cassidy Bayou Drainage Dist., 154 Miss. 119, 122 So. 205 (1929); Jones v. George, 126 Miss. 576, 89 So. 231 (1921); Indian Creek Drainage Dist v. Garrott, supra note 270.

[272]64 Miss. 29, 8 So. 165 (1886).

[273]Covington v. Cassidy Bayou Drainage Dist., 154 Miss. 119, 122 So. 205 (1929); Thompson v. Mobile, J. & K.C. R.R., 104 Miss. 651, 61 So. 596 (1913).

[274]Toler v. Bear Creek Drainage Dist., 141 Miss. 851, 106 So. 88 (1925).

[275]Miss. Code Ann. §§ 4576-4766 (drainage districts), 4767-4768 (counties), 4769-4828 (flood control districts). See Toler v. Bear Creek Drainage Dist., 141 Miss. 851, 106 So. 88 (1925); Jones v. Drainage Dist., 102 Miss. 799, 59 So. 921 (1912); Cox v. Wallace, 100 Miss. 525, 56 So. 461 (1911).

[276]Miss. & T. R.R. v. Archibald, 67 Miss. 38, 7 So. 212 (1890); Alcorn v. Sadler, 66 Miss. 221, 5 So. 694 (1889).

rest in a lake, pond or other body of water,[277] though he could not collect, concentrate, and then discharge these waters in unnatural quantities upon the land of another.[278] Under the common law rule the landowner was not required to exercise due care, but in Mississippi this has been modified and if he can handle the water economically in a manner which does not injure others he must do so.[279] This is especially true of railroads, where the criteria for determining the methods of construction are character and value of the works, forseeable interference with the usual stream flow, the extent of injury to landowners compared to the cost and value of construction, and whether another method equally convenient, safe and inexpensive could be used.[280] Under the impetus of the drainage district statutes the courts have gradually turned to the civil law rule, under which the owner of higher land has the right to have diffused surface water flow on lower unimproved land, though he may not collect and discharge it; but the lower owner may take such steps as he can to carry the water away from his land, though he cannot use the higher land or burden it by more water than would naturally accumulate. When the higher land is altered so that the volume of water increases or the flow concentrates, the higher owner by himself or in conjunction with the lower owner, must remedy the situation.[281] The Mississippi court has advanced both the modified common law and civil law theories in recent years, so that its position is at times confusing. It should be noted that after diffused surface water comes to rest as a part of a collection of water it is subject to the control of the landowner where accumulated.[282] It has also been held that the landowner over whose land it runs may appropriate diffused surface water.[283]

Mississippi follows the minority rule that an upper riparian may discharge diffused surface water into a watercourse or drain when he acts reasonably and with due care, even though this may result in injury to a lower proprietor.[284] Although the state constitution prohibits the passage of local or private laws changing natural drains or channels, this has been held not to apply to artificial drains, which may be changed or

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277Columbus & G. R.R. v. Taylor, 149 Miss. 269, 115 So. 200 (1928); Sinai v. Louisville, N.O. & T. R.R., 71 Miss. 547, 14 So. 87 (1893); Illinois Cent. R.R. v. Miller, 68 Miss. 760, 10 So. 61 (1891).

278Cresson v. Louisville, N.O. & T. R.R., 166 Miss. 352, 146 So .462 (1933).

279Holman v. Richardson, 115 Miss. 169, 76 So. 136 (1917). The landowner may get damages for the injuries to his lands but not for crop injuries. See also Brinkley v. Eaton, 205 Miss. 815, 39 So.2d 491 (1949); Steed v. Kimbrough, 197 Miss. 430, 19 So.2d 925 (1944).

280Miller v. Ervin, 192 Miss. 712, 6 So.2d 910 (1942); Louisville & N. R.R. v. Capedon, 192 Miss. 28, 4 So.2d 544 (1941); Columbus & G. R.R. v. Taylor, 149 Miss. 269, 115 So. 200 (1928); Sinai v. Louisville, N.O. & T. R.R., 71 Miss. 547, 14 So. 87 (1893).

281Coca-Cola Bottling Co. v. Murphey, 212 Miss. 823, 55 So.2d 485 (1951); Filtrol Corp. v. Hughes, 199 Miss. 10, 23 So.2d 891 (1945); Holman v. Richardson, 115 Miss. 169, 76 So. 136 (1917); Sinai v. Louisville, N.O. & T. R.R., supra note 280; Illinois Cent. R.R. v. Miller, 68 Miss. 760, 10 So. 61 (1891).

282Sinai v. Louisville, N.O. & T. R.R., supra note 281; Illinois Cent. R.R. v. Miller, 68 Miss. 760, 10 So. 61 (1891).

283Columbus & G. R.R. v. Taylor, 149 Miss. 269, 115 So. 200 (1928).

284Masonite Corp. v. Windham, 210 Miss. 90, 48 So.2d 622 (1950); Jones v. Walker, 44 So.2d 466 (Miss. 1950); Board of Drainage Com'n. of Bolivar County v. Board of Drainage Com'n. of Washington County, 130 Miss. 764, 95 So. 75 (1923).

constructed for drainage purposes.[285] Natural watercourses may only be changed by general laws. Where a landowner has constructed an artifical drain lying wholly on his land he is not required to prevent the water from taking a new, naturally formed course.[286] A new statute provides for the use of drainage canals in irrigating abutting farm lands.[287]

Concerning drainage it has also been held that an upper riparian may straighten a watercourse by an artificial channel large enough to prevent the overflowing of his lands, or to improve or reclaim them, even though this increases the volume or speed of the flow. If the upper owner does this, the lower owner has a right to do the same, though he may not back the water onto the former's land, and both rights are qualified by the circumstances of each case.[288]

From these statutes and decisions it may be seen that the riparian right in Mississippi has been limited and modified greatly. Furthermore, the Mississippi court has recognized that the right to "natural flow" of the stream may be lost by act of God, operation of law, or express or implied waiver by the landowner himself, though implied waiver must constitute an act incompatible with the right and coupled with intent.[289] Thus, riparian rights may be lost by common law abandonment, though temporary relief of drainage conditions is not considered abandonment. A riparian right may be acquired by prescription, although this takes the full statutory period, whereas abandonment may be accomplished in less time.[290]

It should also be noted that in Mississippi there is a presumption that ground waters are percolating until a well defined, continuous underground is known or ascertainable from surface indications without underground exploration.[291] A strict and difficult proof is needed for surface stream law to obtain. The court has adopted the rule in *Acton v. Blundell*[292] in that percolating water is considered a part of the realty and can be used at the will of the landowner. As most of the water beneficially used in Mississippi comes from wells,[293] and as water cannot be transported from one watershed to another[294] no matter how beneficial the use, the ground water law in Mississippi is quite important to all water users.

285Miss. Const. Art. 4, § 90 (q); Belzoni Drainage Com'n. v. Winn, 98 Miss. 359, 55 So. 778 (1910).

286Brinkley v. Eaton, 205 Miss. 815, 39 So.2d 491 (1949); Holman v. Richardson, 15 Miss. 169, 76 So. 136 (1917).

287Miss. Code Ann. §§ 4673.5, 4673.7 (1942).

288Jones v. Walker, 44 So.2d 466 (Miss. 1950); American Sand & Gravel Co. v. Rushing, 182 Miss. 496, 184 So. 60 (1938); Board of Drainage Com'n. of Bolivar County v. Board of Drainage Com'n. of Washington County, 130 Miss. 764, 95 So. 75 (1923).

289Miss. Central R. R. v. Mason, 51 Miss. 234 (1875).

290The Magnolia v. Marshall, 39 Miss. 109 (1860). See Miss. Mills Co. v. Smith, 69 Miss. 299, 11 So. 26 (1892).

291Board of Sup'r. of Clarke County v. Miss. Lumber Co., 80 Miss. 535, 31 So. 905 (1902).

29212 Mees & W. 335, 152 Eng. Rep. 1223 (1843).

293"Water for the Future in Mississippi," Report of the Mississippi Water Resources Policy Commission, Sept. 1954, p. 15.

294Pompey Lake Drainage Dist. v. MvKinney Lake Drainage Dist., 136 Miss. 168, 99 So. 387 (1924); Toler v. Bear Creek Drainage Dist., 141 Miss. 851, 106 So. 88 (1925). This applies both to private persons and drainage districts.

V. The Mississippi Water Conservation Law

From the foregoing discussion it is apparent that the riparian doctrine is well established in Mississippi. The new act will certainly come into conflict with it on several grounds, even though the legislature has been careful to avoid many of the problems which faced western states instituting an appropriative system. The spearhead of the attack on the act will probably be encroachment upon vested riparian rights.

In general the act dedicates all water in watercourses, lakes, and natural bodies of water in the state to the public use,[295] institutes the doctrine of prior appropriation to supplant the riparian doctrine,[296] establishes a Board of Water Commissioners[297] and a Water Engineer[298] to determine and administer appropriative rights, and outlines the procedure for their acquisition.[299] The statutory method for acquisition is exclusive.[300] The act is based on the theory followed by the legislatures of Kansas, Nebraska and Oregon[301] and follows both the "Wyoming system", in that a permit must be granted before diversion works may be commenced,[302] and the "Colorado system," in that, although the Board has jurisdiction for administrative determinations of water rights, may make orders, promulgate rules and regulations, and issue, terminate, and modify permits,[303] no appropriation may be declared forfeited except by a court of competent jurisdiction.[304]

The primary problem faced in administrating the act is the attempt to replace the riparian doctrine. This is sought by a network of intertwined provisions. It should be noted that, unlike most water laws in riparian states adopting appropriation, in no place is the term "riparian" used, nor is there a "subject to vested rights" clause.[305] The first of these provisions is the dedication clause,[306] which the Kansas court seemed to think the most important in abrogating riparian rights.[307] However, in

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295H.B. No. 232 § 1 (b), 1956 Reg. Sess.: "Water occurring in any watercourse, lake or other natural water body of the state, is hereby declared to be public waters and public wealth of the state and subject to appropriation in accordance with the provisions of this act, and the control and development and use of water for all beneficial purposes shall be in the state, which, in the exercise of its police powers, shall take such measures as shall effectuate full utilization and protection of the water resources of Mississippi."

296Id. § 4 (a): "After April 1, 1958, no right to appropriate or use water subject to appropriation shall be initiated or acquired except upon compliance with the provisions of this act, and no person shall take water from a stream, lake or other watercourse without having a valid right to do so."

297Id. § 8.

298Id. § 10.

299Id. §§ 12-26.

300Id. § 4 (a).

301See notes 175-188 supra.

302H.B. No. 232 § 16, 1956 Reg. Sess. "Any person intending to acquire an appropriate right to any of the surface streams, lakes, and other watercourses of the state for beneficial use, may do so only by making application to the board for a permit to make such appropriation. . ."

303Id. §§ 5, 7, 13, 25, 26.

304Id. § 5.

305See S. Dak. Code 1939, § 61.0101.

306H.B. No. 232, § 1 (b), 1956 Reg. Sess.

307State ex rel. Emery v. Knapp, 167 Kan. 346, 207 P.2d 440 (1949).

view of the past decisions declaring the riparian right one in property, vesting with the patent, and subject to the due process clause of the state and federal constitutions, it would seem that the act is ineffective in divesting riparians of their usufruct in the water.

This would be true despite other provisions which seek to incorporate some riparian rights into the protection of the act. Following the theory of the Nebraska, Kansas and Oregon legislatures, the Mississippi act offers protection to riparians who have made actual beneficial use of water within three years prior to the effective date of the act.[308] Although this theory has been upheld in the courts of these states it should be noted that the United States Supreme Court has not passed on its constitutionality, having decided the *California-Oregon Power Co.* case[309] on federal grounds alone. As a riparian right does not lapse by nonuse, this would seem to be a confiscation of property without just compensation, and so a violation of due process. Also there should be a strong argument for denial of equal protection of law. There appears to be some discrepancy as to the effective date of the act, for section thirty provides that it shall be in force from and after passage with the exceptions under Section four,[310] but this section refers to the acquisition of rights and not to the retention of rights initiated under a riparian use as in Section 2 (g) (2)- (3).[311] Especially in agricultural uses, when the time of application is short, will this lead to confusion and litigation.

One of the Board's first official actions will be a determination of the rights of all persons beneficially using water at the effective date of the act,[312] presumably to allow them to come under Sections 2 (g) (2)- (3).

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[308]H.B. No. 232 § 2 (g), 1956 Reg. Sess: "Appropriation. . . (2) The right to continue the use of water having actually been applied to any beneficial use at the time of the effective date of this act, or within three (3) years prior thereto to the extent of the beneficial use made thereof. . . (3) The right to tabe and use water for beneficial purposes where a person is bona fide engaged in the construction of works for the actual application of water to a beneficial use at the time of the effective date of this act, provided such works shall be completed and water is actually applied for such use within three (3) year after this act becomes effective, with extension of not more than seven (7) years in the discretion of the board. It is not the intent, however, to validate any claim to the use of water, or for rights of construction looking to the use of water, not lawful on the effective date of this act." It should be noted that 2 (g) (2) and 2 (g) (3) cover entirely different aspects of water use, the former being perfected by use before passage of the act. Also that 2 (g) (3) requires permission of the board for an extention if there is no application of the water after three years.

[309]295 U. S. 142 (1935).

[310]H.B. No. 232 § 30, 1956 Reg. Sess.: "Except as provided in section 4 here this act shall take effect and be in force from and after passage." For § 4 (a) see note 296 supra. The headnote to the report of the bill in the advance shee reads: ". . . prescribing the powers and duties of the board, including the issuance of water permits for a fee, commencing January 1, 1957."

[311]H.B. No. 232 § 2 (g) (2)- (3), 1956 Reg. Sess.

[312]Id. § 13: "(a) The board shall make such observations and measurements as will enable it to administratively determine and establish the rights of all water users who, on the effective date of this act, are making beneficial use of water, and shall afford such water users an opportunity to be heard. (b) Such administrative determination of rights, as provided for in this section, shall be made the subject of a written order, the original of which shall be furnished the person concerned. Such observations and measurements as were made shall be reduced to writing and filed with a copy of the order of determination certified to by the chairman of the board, in the office of the clerk of the chancery court in the county in which the point of diversion exists. (c) Service of notice shall be deemed completed upon depositing the notice in

In doing this the Board may establish its own units of measurement,[313] and promulgate its own rules and regulations.[314] The orders of the Board will be in effect from the date of their entry in the records of the chancery clerk, though they may be stayed by any court of competent jurisdiction by following the appellate procedure outlined in Section twenty-five. The procedure under Sections two and thirteen is different from that in Section sixteen, which refers to the acquisition of rights after the time in Section four has passed.[315] But even though a three year grace period is given riparians,[316] this is antagonistic to the riparian principle that apportionment of water rights is not a proper subject of administrative control. Also this provision tends to bring the riparian immediately under the statute, and could have the effect by direct administrative action of cutting off either the three year period of grace of Section 2 (g) (2)-(3) or that in Section four.

In the definition of "unappropriated waters"[317] and in allowing appropriation down to the "estimated average minimum flow"[318] of the stream, the statute also contravenes the riparian doctrine. In Mississippi all the flow of the stream belongs to the riparian proprietors abutting that stream, with the exception of vagrant flood waters.[319] Another danger to the riparians may be found in the provision allowing the Board to supplement the "average minimum flow" data with "reasonable calculations."

There are some instances of statutory affirmation of the riparian doctrine. The statute specifically does not affect ground or subterranean

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the post office, as registered mail, addressed to the person concerned at his last known post office address. The order of determination of the board shall be in full force and effect from the date of its entry in the office of the clerk of the chancery court until its operation shall be stayed by an order of a court of competent jurisdiction."

[313]Id. § 11 (b).

[314]Id. § 7: "It shall be the duty of the board to approve all applications made in such form as shall meet the requirements of this act and such rules and regulations as shall be promulgated by the biard, which cotemplate the utilization of water for beneficial purposes, within reasonable limitations, provided, the proposed use does not prejudicially and unreasonably affect the public interest."

[315]Id. § 4 (a). "After April 1, 1958, no right to appropriate or use water subject to appropriation shall be initiated or acquired. . . ."

[316]Id. § 2 (9) (2)-(3).

[317]Id. § 15: "The following are hereby declared to constitute unappropriated waters: (a) All water which has never been appropriated. (b) All water heretofore appropriated which has not been in process, from the date of the initial act of appropriation, of being put, with due diligence in proportion to the magnitude of the work necessary properly to utilize it for the purpose of appropriation, or which has ceased to be put to that useful or beneficial purpose for which appropriated. (c) All water appropriated pursuant to authority of the board which has ceased to be put to the useful or beneficial purpose for which it was appropriated. (d) Water which having been appropriated or used seeps or flows back into a watercourse."

[318]Id. § 2 (i): " 'Established average minimum flow'—when reasonably required for the purposes of this act, the board shall determine and establish the average minimum flow for a given stream at a given point thereon. The 'average minimum flow' as used in this act shall be the average of the minimum daily flow occuring during each of the five (5) lowest years in the period of the preceeding twenty (20) consecutive years. Such determination shall be based upon available stream-flow data, supplemented, when available data is incomplete, by reasonable calculations." See also id. §§ 4 (a)-(c).

[319]Morgan v. Reading, 3 Miss. 366 (1844); Jones v. George, 126 Miss. 324 (1921). See Cubbins v. Miss. River Com'n., 241 U. S. 351 (1916).

water rights[320] so that it could be inferred that riparian rights still exist in subterranean streams and in the subflow of surface streams. It does not apply to lakes with no outlet to which only one landowner is riparian,[321] nor to the dredging or washing of sand and gravel.[322] Although a domestic user may elect to acquire a permit under the statute he is not bound to do so.[323] The riparian doctrine that a landowner may use the water from a spring arising on his land so long as he does not interfere with the right of a water user below him is restated.[324] However, the provision that a landowner may dam a gully on his property or on a stream originating on his property so long as he allows the average minimum flow to pass, if such is required to protect the rights of users below.[325] is directly antagonistic to the riparian idea of tenancy in common and apportionment of the water. The next provision seems to be a contradiction in terms, for it provides that, "subject to the common law," any person may dam a stream having a minimum flow not exceeding one half million gallons a day, and may impound and utilize up to 300 acre feet without a permit, so long as this does not affect the average minimum flow.[326] Certainly this could not be done "subject to the common law," for under common law riparian theory more than a minimum flow must be maintained by an upper riparian if there are other riparian proprietors on the stream.

These are the most obvious defects in the act, which could easily be rectified by a constitutional amendment written along the lines of the declaration of policy and the dedication clause in Section one.[327] Other provisions of the act raise further problems. One of the most apparent is that there are no priorities of use,[328] but only a general statement that

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[320]H.B. No. 232 § 1 (c), 1956 Reg. Sess.: "Nothing in this act shall be construed or interpreted as affecting ground or subterranean water rights or usage." "Ground water" is defined by § 2 (b) as "That water occuring beneath the surfact of the ground."

[321]Id. § 2 (h): " 'Watercourse'—Any natural lake, river, creek, cut or other natural body of fresh water or channel having definite banks and bed with visible evidence of the flow or occurrence of water, except such lakes without outlet to which only one landowner is riparian." This is substantially similar to the definition of watercourse in Ferris v. Wellborn, 64 Miss. 29, 8 So. 165 (1886), and under the statutory definition there appears to be no requirement of a definite source or a constantly running stream.

[322] Id. § 3.

[323]Id. § 4 (a): ". . .provided, however, nothing herein shall interfere with the customary use of water for domestic purposes, and the user of water for domestic purposes may elect to establish a right to the use of such water under the procedures provided in this act. . . ." As the only "customary" domestic uses in Mississippi prior to the act were riparian, it must be assumed that the statute here refers to riparian users.

[324]Ibid: ". . .and provided, further, that nothing herein shall operate to deprive any landowner of the right to use the water from a spring arising on his land so long as such use does not interfere with the right of any water user below."

[325]Ibid: ". . .and provided, further, that nothing herein shall interfere with a landowner's right to place a dam across a gully on his property or across a stream that originates on his property so long as provision is made for continued established average minimum stream flow, if and when such flow is required to protect the rights of water users below."

[326]Id. § 4 (b): "Subject to the common law, or other lawful water rights of others, any person may build and maintain a dam on any stream having a minimum flow of not more than one half million gallons of water per day and utilize up to three hundred (300) acre feet of the impounded water without a permit from the board so long as such action does not affect the established average minimum flow in the stream below the dam."

[327]See note 295 supra.

[328]See notes 133-145 supra.

the Board shall use the criterion of "beneficial use,"[329] which at best is too broad to be helpful, and at its worst could subject the utilization of water in Mississippi to the capricious whims of the Board.

Other problems may be seen in conjunction with this in the provision that any person may be allowed to appropriate below the established average minimum flow on the mere written assurance that the water would be returned in substantially the same amount, while domestic and municipal users are not bound by the limits of the average minimum flow.[330]

However, on the whole the act is inclusive, well written and drawn from the better provisions of previous statutes. In acquiring an appropriative right, the provisions of the statute should be followed closely. An application stating the name and address of the appropriator, source of supply, amount of water south, location of diversion works, by maps or plats conforming to the statutory requirements,[331] estimated time of completion of the works and first application to beneficial use, and description of land, if for irrigation, or population estimate if for municipal use, must be submitted to the Board.[332] The time of receipt of the application determines its priority, though if an application is returned because of a defect it does not lose this priority.[333] When the application is approved the appropriator receives a permit to begin construction of the diversion works and to take steps to apply the water to his approved beneficial use, but an application may be approved for a less amount of water than requested, and no application is to be approved until ten days after its substance has been published in a newspaper of general circulation in the county where the point of diversion will be placed, and public hearing given any aggrieved person.[334] If the application is denied, no work may be continued on the diversion works,[335] but the applicant may appeal on legal or factual questions to the circuit court of the county where the diversion point exists, where testimony may be given by an aggrieved person and the order of the Board sustained, modi-

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[329]H.B. No. 232 § 7, 1956 Reg. Sess.: "Appropriation of surface waters of the state shall not constitute absolute ownership or absolute rights of use of such waters, but such waters shall remain subject to the principle of beneficial use. It shall be the duty of the board to approve all applications made in such form as shall meet the requirements of this act and such rules and regulations as shall be promulgated by the board, and which contemplate the utilization of water for beneficial purposes within reasonable limitations, provided, the proposed use does not prejudicially and unreasonably affect the public interest. If it is determined that the proposed use of the water sought to be appropriated is not for beneficial purposes, is not within reasonable limitations, or be detrimental to the public interest, it shall be the duty of the board to enter an order rejecting such application or requiring its modification."

[330]Id. § 4 (c): "The board shall have the authority to permit the appropriation of water of any stream only in excess of the established average minimum flow as based upon records or computations by the board; provided, however, exceptions may be made for domestic and municipal users; and provided, further, that the minimum flow upon written assurance that such water will be immediately returned to stream in substantially the same amount to insure the maintenance at all time of the average minimum flow."

[331]Id. § 17 (b).

[332]Id. § 16.

[333]Id. § 17 (a).

[334]Id. § 18 (a). This section must be read with § 7.

[335]Id. § 18 (b).

fied, or reversed.[336] From this appeal to the Supreme Court may be taken. However, within fifteen days of service of notice of appeal the Board may offer to correct its order on any matter mentioned in the appeal, which the appellant may accept, thus obviating the necessity for the appeal.[337] Within sixty days after the completion of the diversion works and actual application of water the appropriator must notify the Board, which, after inspection of the works, issues a license, which must be filed in the chancery court of the county where the diversion works are located.[338] Thus it would appear that both a permit and actual application, followed to completion diligently in the time allotted the applicant,[339] are required to perfect an appropriation.

If an appropriator does not utilize his right for three consecutive years under the statute he seems automatically to lose it.[340] From the wording of this provision the right may be lost by non-use for even a less time, for it requires application to the Board to reinstate the right after a lapse in use, though reinstatement seems automatic. It should be noted that there could be some conflict between this provision and that part of Section fifteen defining "unappropriated water" as "water appropriated pursuant to authority of the Board which has ceased to be put to the useful or beneficial purpose for which it was appropriated."[341] Conceivably this part of Section fifteen could refer to the abandonment of the right, which could occur in less time than required for the statutory loss under Section six. Also there must be a determination whether under Sections six the right is lost automatically or whether the forfeiture requires positive action by the Board.

There are other meritorious provisions in the statute. No appropriation which will cause pollution[342] or impair navigation[343] is permitted. Although there is no provision for increasing a municipality's right, there is elaborate provision for securing an appropriation large enough to meet

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336Id. § 25 (a).

337Id. § 25 (b).

338Id. §19.

339Id. § 18 (b): "The board shall limit the time for the perfecting of an appropriation to a reasonable period within which the proposed works can be completed by due diligence taking into consideration the size, complexity and cost of the work, and seasonal conditions, and may for good cause shown by the applicant allow an extention of time."

340Id. § 6: "The right of the appropriator and his successors to the use of water shall terminate when he ceases for three (3) consecutive years to use it for the specific beneficial purpose authorized in his permit or license; provided, however, that upon his application prior to the expiration of said three (3) year period for extension of said permit or license, the board may grant such extension without the loss of priority."

341Id. § 15 (c).

342Id. § 4 (d): "No appropriation of water shall be authorized that will impair the effect of stream standards set under the pollution control laws of this state based upon a minimum average stream flow." See also in regard to water beneficially used within three years of the act, § 2 (g) (2): "Provided that it is not the intent of this act that any person making use of any watercourse for waste disposal or in pollution abatement, on the effective date of this act, shall be construed as having any vested right to pollute the waters of the watercourse."

343Id. § 4 (e): "No appropriation of water shall be authorized that will impair the navigability of any navigable watercourse. A determination of impairment by the Corps of Engineers of the United States shall constitute prima facie evidence of such impairment." Apparently this applies to navigable watercourses under both the federal and state definitions.

the requirements of twenty years' population growth in cities.[344] Changes in place of use or point of diversion may be secured by permission of the Board alone and unauthorized change is punished by a fine of $200 for each day the violation continues.[345] The levee districts are protected by requiring their approval of the building of all dams, whether they require permits from the Board or not.[346]

Many of these provisions deal with the powers of the Board, which has authority to enter into compacts with other states respecting Mississippi's water rights and resources.[347] Members of the Board or those authorized by them may enter any lands in the exercise of their powers under the statute.[348] The Board is required to aid the court which makes the determination in the distribution of water under he adjudicated rights.[349] When the necessity arises the Board may divide the state into water districts.[350] Finally, to protect the rights of all water users there must be on the board, at least one recreational, industrial, municipal, and agricultural representative at all times.[351]

VI. Conclusion

This is the statute by which the legislature hopes to secure a more complete utilization of Mississippi's water resources. In its outline of the duties of the Board of Water Commissioner and the method for the acquisition of appropriative rights it is a superior statute. Its great defects are, first, that it is, in this writer's opinion, an unconstitutional attempt to abolish vested property rights of riparian proprietors without compensation. Without a constitutional amendment it might still survive this objection through judicial interpretation. Second, it sets up no system of priorities by which the Board may guage applica-

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344Id. § 16: "(h) if for municipal water supply, or the supply of an adjacent area to be served by the municipality, it shall give the present population to be served, and the estimated future requirements of the city not to exceed twenty (20) years; said twenty (20) years' estimate of future requirements to be based on the same rate of increase of population as that had in the twenty (20) year period, or such fraction thereof as required, immediately preceeding the estimate, unless an unusual situation shall be shown to the board to exist, or is forseen which would justify a deviation from the twenty (20) year rule."

345Id. § 23 (a)-(b).

346Id. §§4 (b), 20.

347Id. § 21: "The board shall have authority to enter into compacts and agreements concerning this state's share of waters flowing in watercourses where a portion of such waters are contained within the territorial limits of a neighboring state." The language of this provision seems to recognize a riparian right existing in the state, power over which is given to the board.

348Id. § 22.

349Id. § 24.

350Id. § 14: "The board shall divide the state into water districts with reference to water resources; however, no district shall be created until a necessity therefor exists."

351Id. § 8: "For the administration of this act there is hereby created a Board of Water commissioners of the State of Mississippi, consisting of seven (7) members appointed by the governor, by and with the advice and consent of the senate, whose terms of office shall be for a period of four (4) years as follows: One from each of the congressional districts as now constituted and one from the state at large. At all times the membership of said board shall have represented on it at least one member well versed in each of the major types of water users in the state as follows: recreational, industrial, municipal and agricultural. The chairman shall be elected by the members of the board."

tions for appropriative permits. Finally it attempts no correlation between the law of watercourses, diffused surface water, and ground water. It is only when these adjustments have been made that Mississippi will be able to attain to the fullest the beneficial aim of the immense labor which went into the passage of this statute.

Douglas C. Wynn

RECENT DECISIONS

Constitutional Law — Illegally Obtained Evidence Admitted in State Proceeding

Petitioner was convicted of involuntary manslaughter due to driving while intoxicated. Evidence of his intoxication was obtained by a physician's taking a specimen of blood from petitioner while he was unconscious after the accident. The original habeas corpus proceeding was brought in the Supreme Court of New Mexico where petition was denied. The United States Supreme Court granted certiorari. Held:[1] Affirmed. Admitting evidence obtained in violation of the fourth amendment[2] did not deny petitioner due process of law. *Breithaupt v. Abrams,* 77 S.Ct. 403 (1957).

The requirement of due process of law under the fourteenth amendment[3] does not invalidate convictions in state courts based on evidence obtained by illegal search and seizure[4]. And the amendment has been interpreted not to include protection against self-incrimination.[5] All states but two[6] have constitutional provisions prohibiting self-incrimination[7], however, none have construed these provisions to exclude anything but testimonial compulsion[8]. The United States Supreme Court has consistently held, however, that a state court's admitting in evidence confessions obtained through fear, torture, or exhaustion is a denial of due process[9]. As to real evidence the Supreme Court has invalidated state convictions only when the method of obtaining such "shocks the conscience[10]" or "offends a sense of justice[11]". Although the noted case is one

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[1]Decision was 6-3 with C. J. Warren, J. J. Douglas and Black dissenting. Warren felt that the case could not be distinguished from Rochin v, California, 342 U. S. 165 (1952). Douglas, with whom Black joined, dissented on the ground that petitioner has been compelled to furnish evidence against himself and such is a violation of our system of government.

[2]U. S. Const. amend. IV. "The right of people to be secure in their persons, houses, papers, and effects, *against unreasonable searches and seizures,* shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (emphasis added)

[3]U. S. Const. amend. XIV § 1. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

[4]Wolf v. Colorado, 338 U. S. 25 (1949); State v. Sturtevant, 96 N.H. 99, 70 A2d 909 (1950). But in federal courts such evidence is unadmissible as violating the fourth amendment, Weeks v. United States, 232 U. S. 383 (1914).

[5]Adamson v. California, 332 U. S. 46 (1947); Twining v. New Jersey, 211 U. S. 78 (1908).

[6]Iowa and New Jersey.

[7]8 Wigmore, Evidence § 2252 (3d ed. 1940). Pertinent Mississippi section is Miss. Const. art. 3 § 26. "In all criminal prosecutions the accused . . . shall not be compelled to give evidence against himself."

[8]8 Wigmore, Evidence § 2263 (3d ed. 1940).

[9]Leyra v. Denno, 347 U. S. 556 (1955); Brown v. Allen, 344 U. S. 443 (1953); Williams v. United States, 341 U. S. 97 (1951); Turner v. Pennsylvania, 338 U. S. 62 (1949; Harris v. South Carolinia, 338 U. S. 25 (1949); Lee v. State, 332 U. S. 742 (1948); Haley v. Ohio, 332 U. S. 596 (1948); Watts v. Indiana, 338 U. S. 49 (1942); Brown v. Mississippi, 297 U. S. 278 (1936).

[10]Rochin v. California, 342 U. S. 165 (1952).

[11]Brown v. Mississippi, 297 U. S. 278 (1936).

of first impression in the United States Supreme Court, the same question has been presented to state courts on several occasions. The concensus has been in agreement with the holding herein — that admission of such evidence does not violate the restrictions of due process[12]; in Texas, however, the state must show consent on the part of the accused to comply with due process[13]. The states are divided over the admissibility of such evidence when it is forcibly obtained against the will of the prisoner or under protest[14].

The court says in the instant case that the obtaining of blood by skilled physicians was not so brutal as to make the case analogous to the *Rochin* case. It thereby further limits the doctrine of the *Rochin* case as to the inadmissibility of illegally obtained real evidence[15] It appears that the Supreme Court will invoke due process only when the taking is by a flagrant abuse of the person.[19] Chief Justice Warren suggests an interesting rule in his dissenting opinion[17] which would exclude all evidence obtained by "bruising the body, breaking skin, penetrating tissue, or extracting body fluids." This might be a plausible interpretation of this facet of due process but it seems to be contrary to the weight of authority. This writer must agree with the majority — that this incident does not violate the federal constitutional requirement of due process of law.

Edward E. Laird, Jr.

Criminal Law — Grounds for New Trial

Appellant shot and killed his intoxicated brother-in-law who had advanced on him in a threatening manner. He was indicted for murder and convicted of manslaughter. Held: Reversed. Motion for new trial granted. *Folks v. State,* 92 So.2d 461 (Miss. 1957).

The rules for granting new trials are well defined and settled today.[1] At early common law in England the only recourse for a convicted felon, who may have been improperly convicted, was a respite of execution by

[12]People v. Haeussler, 42 Cal. 2d 252, 260 P.2d 8 (1953); People v. Duroncelay, 146 Cal. App. 2d 96, 303 P.2d 617 (1956); Block v. People, 125 Colo. 36, 240 P.2d 512 (1951); State v. Ayers, 70 Idaho 18, 211 P.2d 283 (1945); State v. Sturtevant, 96 N.H. 99, 70 A.2d 909 (1950); State v. Alexander 7 N.J. 585, 83 A.2d 441 (1951); State v. Cram, 176 Ore. 577, 160 P.2d 283 (1945).

[13]Trammel v. State, 287 S.W. 2d 487 (Tex. Crim. App. 1956). "The State having failed to show that the specimen was taken with the consent of the appellant, the testimony of Dr. Mason was not admissible."

[14]Holding due process violated are: Apodaca v. State, 140 Tex. Crim. 596, 146 S.W. 2d 381 (1941); Trammel v. State, 287 S.W. 2d 487 (Tex. Crim. App. 1956); People v. Martinez, 130 Cal. App. 2d, 54, 278 P.2d 26 (1955). Holding due process not violated are: State v. Berg, 76 Ariz. 96, 259 P.2d 261 (1953); People v. Kiss, 125 Cal. App. 2d 138, 269 P.2d 924 (1954); People v. Woods, 139 Cal. App. 2d 138, 293 P.2d 901 (1956).

[15]Irvine v. California, 347 U. S. 128 (1954), interpreted the Rochin case as not excluding all illegally obtained evidence when it said, "Although Rochin raised the search-and-seizure question, this court studiously avoided it. . . . Obviously, it thought that illegal search and seizure alone did not call for reversal."

[16]It is brought out in both dissenting opinions that if the petitioner had been awake and had struggled to keep the police and physicians from extracting the blood, the court, it appears, would have invalidated the proceedings.

[17]77 S. Ct. at 412.

[1]Dulaney v. Rankin, 47 Miss. 391 (1872).

the judge while the defendant applied for a pardon.[2] This old and harsh rule has been abrogated by statute,[3] or by the courts.[4] A Mississippi court may grant a new trial in a criminal case on a motion of its own.[5] The number of new trials grantable at common law is without limit,[6] but Mississippi, among other states, has a successive verdict statute[7] which limits the number of new trials to two for the same party on questions of fact,[8] and this has been applied to criminal proceedings.[9]

Apparently, or rather, by way of speculation, the ground upon which the court granted a new trial in the instant case was that the verdict was contrary to the weight or preponderance of the evidence, but nowhere in the opinion can these latter words be found.[10] There is, of course, authority for the court's substituting its judgment for that of the jury on questions of fact, and granting a new trial,[11] but the court is called upon to state that the verdict is contrary to the weight of the evidence.[12] The objection to the instant decision, then, is an objection to the inaccuracy with which the court chose its words. If the ground upon which the motion should have been granted was that the verdict was contrary to

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[2]1 Chitty, A Practical Treatise on the Criminal Law § 654 (1819); People v. Fletcher, 35 Misc. 711, 72 N.Y.S. 386 (1901).

[3]The Mississippi statute provides very simply: "Every new trial granted shall be on such terms as the court shall direct; and no more than two new trials shall be granted to the same party in any cause. Provided, however, that when the sole ground for a new trial is the excessiveness or inadequacy of damages assessed, the party aggrieved may elect to appeal from the order granting a new trial." Miss. Code Ann. § 1536 (1942).

A typical statute is Okla. Stat. Ann. tit. 22, § 952 (1910) which reads as follows: "A court . . . has power to grant a new trial . . . in following casses only:

1. When the trial has been in his absence, if the charge is for a felony.
2. When the jury have received any evidence out of court other than that resulting from a view of the premises.
3. When the jury have separated without leave of the court . . . or have been guilty of any misconduct. . . .
4. When the verdict has been decided by lot, or by any means other than a fair expression on the part of the jury.
5. When the court has misdirected the jury on a matter of law or has erred in the decision of any question of law arising during the course of the trial.
6. When the verdict is contrary to law or evidence.
7. When new evidence is discovered, material to the defendant, and which he could not have with reasonable diligence have discovered before the trial. . . .

[4]The Mississippi statute does not attempt to set out the grounds for a new trial. See Miss. Code Ann. § 1536 (1942), supra note 3. Other states which leave it up to the courts to determine the grounds for a new trial are Deleware, Illinois, Massachusetts, New Mexico, North Carolina, and Virginia.

[5]Faust v. State, 204 Miss. 297. 37 So.2d 315 (1948).

[6]Barrett v. Lewiston Ry., 113 Me 562, 92 A. 934 (1915) (Four successive verdicts granted on issueof fact); Los King v. Fisher, 236 Wis. 588, 295 N.W. 715 (1941).

[7]Tagert v. Baker, 57 Miss. 303 (1879).

[8]Butler v. State, 179 Miss. 865, 176 So. 589 (1937); Thornton v. West Feliciana, 29 Miss. 143 (1855); Ray v. McCary, 26 Miss. 404 (1853). There has been sharp conflict by by the courts as to whether it is a bar to conviction of a crime higher than the prior conviction when defendent is re-tried. One line of authorities, to which Mississippi subscribes, has held that the defendant may be re-tried and convicted of a crime of a higher degree, while other authorities consider that the defendent has impliedly been acquitted of the higher crime. See Jones v. State, 144 Miss. 52, 109 So. 265 (1926).

[9]Conway v. State, 177 Miss. 461, 171 So. 16 (1936).

[10]The following words can be found: "There are extenuating circumstances . . the ends of justice would be better served. . ."

[11]Conway v. State, 177 Miss. 461, 171 So. 16 (1936). This case was cite din the instant opinion as substantiating such a substitution.

[12]Id. at 17.

the weight of the evidence, that should have been stated — if a new ground was created, that should have been made plain. It might be said that it is indeed a peccadillo for which the court is being censured, inasmuch as the *result could* have been identical had the court used the suggested words. But this is to forget that the means are as significant as the ends — or moreso. And it is to forget that it is this very type of peccadillo that confounds our jurisprudence by unnecessarily rendering the uncertain even more uncertain.

Thomas D. Berry, Jr.
Lester Stanley Cook, Jr.

Criminal Law — Homicide — Defendant Only Eye Witness

Appellant was convicted of manslaughter. On November 3, 1955, he took Juanita Knight in his car to her parent's house in the country. Appellant and Juanita went to Laurel late that afternoon and met Louvenia Knight there. They all became intoxicated and appellant began to drive recklessly, causing Louvenia and Juanita to take a cab home. Shortly after their arrival, appellant came to the back door. Louvenia told appellant that she was not going to let him in because he was drunk. Appellant then opened his switch-blade knife, cut the screen door, and proceeded to kick the two latches off of the wooden door. When he entered Louvenia was holding a hammer and Juanita, a razor. He went to his car and picked up his hunting gun. Upon returning, he kicked open the door and reentered the house; when he reached the middle room, Louvenia grabbed the gun. In the ensuing struggle, Louvenia was fatally wounded. Held: Appellant's being the only eyewitness does not compel the court to accept his version that it was an accident. *Reed v. State,* 91 So.2d 269 (Miss. 1956).

The Mississippi rule here involved is well stated in three cases[1] handed down by our court in the same month. *Weathersby v. State* is the leading authority, and states that "where the defendant or the defendant's witnesses are the only eyewitnesses to the homicide, their version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a creditable witness or witnesses for the state, or by the physical facts or by the facts of common knowledge."[2] The early development of this rule may be traced through many cases.[3] The rule

[1]Weathersby v. State, 165 Miss. 207, 147 So. 481 (1933); Smith v. State 167 Miss. 85, 147 So. 483 (1933); Kelly v. State, 147 So. 487 (Miss. 1933).

[2]Weathersby v. State, supra note 1.

[3]Bowen v. State, 164 Miss. 225, 144 So. 230 (1932); Gray v. State, 158 Miss. 266, 130 So. 150 (1930); Blackledge v. State, 157 Miss. 33, 127 So. 684 (1930); Walters v. State, 158 Miss. 880, 122 So. 189 (1929); Wesley v. State, 153 Miss. 357, 120 So. 918 (1929); Ivy v. State, 154 Miss. 60, 119 So. 507 (1928); Brumfield v. State, 150 Miss. 552, 117 So. 529 (1928); Sullivan v. State, 149 Miss. 412, 115 So. 552 (1928); McFather v. State, 147 Miss. 133, 113 So. 187 (1927); Grady v. State, 144 Miss. 778, 110 So. 225 (1926); Strahan v. State, 143 Miss. 519, 108 So. 502 (1926); Stubblefield v. State, 142 Miss. 787, 107 So. 663 (1926); McLeod v. State, 140 Miss. 897, 105 So. 757 (1925); McGehee et al. v. State, 138 Miss. 822, 104 So. 150 (1925); Patty v. State, 126 Miss. 94, 88 So. 498 (1921); Houston v. State, 117 Miss. 311, 78 So. 182 (1918); Hunt v. State, 108 Miss. 588, 67 So. 57 (1915); Wingo v. State, 91 Miss. 865, 45 So. 862 (1908).

does not avail the defendant where a state witness contradicts in material particulars his version,[4] nor where there is no testimony by the defendant or his witnesses;[5] and the defendant's testimony or that of his witnesses must establish a valid defense.[6] Nor does the rule require the acceptance of the testimony of the defendant or his witnesses if it is unreasonable or contradicted by the physical facts or the facts of common knowledge.[7] The court has held that there can be some contrary evidence which will not entirely discredit the validity of the defendant's testimony.[8] There are some cases in which the defendant has been acquitted on the basis of his testimony.[9] Attempts have been made to apply this rule to other fields.[10]

The appellants asked for a peremptory instruction on the basis of this rule. The court denied the instruction by saying that the jury had before it the facts. This is indeed an addition to the exceptions given in the Weathersby case. Nowhere does the court say that there were state witnesses contradicting defendant's version in material particulars, or that the defendant failed to testify or introduce a wintess, or that the defendant's version does not constitute a valid defense, or that the testimony is unreasonable or contradicted by the physical facts or the facts of common knowledge. The court failed to say how this particular case came under any of these provisions to the rule requiring the giving of a

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[4]Reed v. State, 84 So.2d 425 (Miss. 1956); Willette v. State, 80 So.2d 836 (Miss. 1955); Marshall v. State, 220 Miss. 846, 72 So.2d 169 (1954); Smith v. State, 217 Miss. 123, 63 So.2d 557 (1953); Wheeler v. State, 219 Miss. 129, 63 So.2d 517 (1953); Massengill v. State, 216 Miss. 278, 62 So.2d 330 (1953); Grantham v. State, 214 Miss. 756, 59 So.2d 344 (1952); Clanton v. State, 51 So.2d 577 (Miss. 1951); Kitchens v. State, 49 So.2d 729 (Miss. 1951).

[5]Carter v. State, 221 Miss. 111, 72 So.2d 231 (1954); Boatman v. State, 216 Miss. 112, 61 So.2d 784 (1953); Spivey v. State, 212 Miss. 648, 55 So.2d 404 (1951).

[6]Carter v. State, 221 Miss. 111, 72 So.2d 231 (1954); Denham v. State, 218 Miss. 423, 67 So.2d 445 (1953); Boatman v. State, 216 Miss. 112, 61 So.2d 784 (1953); Pitts v. State, 211 Miss. 268, 51 So.2d 448 (1951); Gee v. State, 183 Miss. 697, 185 So. 203 (1938);

[7]Reed v. State, 84 So.2d 425 (Miss. 1956); Cobb v. State, 83 So.2d 833 (Miss. 1955); Willette v. State, 80 So.2d 856 (Miss. 1955); Wiggins v. State, 80 So.2d 17 (Miss. 1955); McNair v. State, 223 Miss. 83, 77 So.2d 30 (1955); Harrelson v. State, 217 Miss. 887, 65 So.2d 237 (1953); Wheeler v. State, 219 Miss. 129, 63 So.2d 517 (1953); Fortner v. State, 56 So.2d 17 (Miss. 1952); Pitts v. State, 211 Miss. 268, 51 So. 201 (1951; Parnell v. State, 211 Miss. 100, 50 So.2d 925 (1951); Goff v. State, 49 So.2d 238 (Miss. 1950); Chapman v. State, 209 Miss. 539, 47 So.2d 844 (1950); Pulliam v.State, 45 So.2d 578 (Miss. 1950); Simmons v. State, 208 Miss. 586, 45 So.2d 149 (1950); Seals v. State, 208 Miss. 236, 44 So.2d 61 (1950); Patten v. State, 207 Miss. 120, 40 So.2d 592 (1949); Smith v. State, 205 Miss. 283, 38 So.2d 725 (1949); Murray v. State, 202 Miss. 849, 32 So.2d 789 (1947); Crockerham v. State, 202 Miss. 25, 30 So.2d 417 (1947); Herrin v. State, 201 Miss. 595, 29 So.2d 452 (1947); Mack v. State, 17 So.2d 200 (Miss. 1944); Webster v. State, 194 Miss. 381, 12 So.2d 533 (1943); Smith v. State, 185 So. 193 (Miss. 1938), reversing and affirming 189 Miss. 102, 195 So. 327 (1940); Vance v. State, 182 Miss. 840, 183 So. 280 (1938); Thornton v. State, 178 Miss. 304, 170 So. 541 (1936); Durr v. State, 178 Miss. 797, 168 So. 65 (1936).

[8]Morgan v. State, 50 So.2d 375 (Miss. 1951); Barclay et al. v. State, 43 So.2d 213 (Miss. 1949); Done v. State, 202 Miss. 418, 32 So.2d 206 (1947); Gandy v. State, 195 Miss. 421, 15 So.2d 685 (1943); Henderson v. State, 180 So. 89 (Miss. 1938).

[9]Fortenberry v. State, 216 Miss. 243, 62 So.2d 325 (1953); Lomax v. State, 202 Miss. 485, 32 So.2d 267 (1949), Westbrook v. State, 202 Miss. 426, 32 So.2d 251 (1947), Newsome v. State, 13 So.2d 464 (Miss. 1943); Harvey v. State, 193 Miss. 561, 10 So.2d 552 (1942); Beall v. State, 168 So. 73 (Miss. 1936); Jarman v. State, 178 Miss. 103, 172 So. 869 (1937).

[10]Reyer v. Pearl River Tung Co. et al., 219 Miss. 211, 68 So.2d 442 (1953); Hill v. Johnson-Cone Brick Co., 180 Miss. 305, 177 So. 520 (1937).

peremptory instruction for the defendant; but the court based its decision upon the fact that "the jury had before it all of the testimony of the events leading up to the shooting and the fact that appellant made an unlawful entry. . ." More explanation as to why the Weathersby rule did not apply would have clarified its future use, but the implication is that it has lost favor.

Orma R. Smith, Jr.

Criminal Procedure — Statutory Writ of Error Coram Nobis

Defendant was convicted of rape. The circuit court entered judgment and defendant appealed. The Supreme Court affirmed conviction. Alleging newly discovered evidence defendant now seeks relief by a petition in the form of a motion for leave to file a motion for a new trial in the trial court, in the nature of a petition for writ of error coram nobis. Held: Petition granted. The evidence being sufficient to raise grave doubt to petitioner's guilt, the petition will be entertained as a remedy supplemental to writ of error coram nobis, since the writ as such will not lie for newly discovered evidence going to the merits of the case. *Lang v. State,* 92 So.2d 670 (Miss. 1957).

"One of the strangest developments in the law of Mississippi has been the present so-called writ of error coram nobis."[1] A writ of error coram nobis is an ancient common law writ[2] devised by the judiciary,[3] the office of which is to bring to the attention of the court, and obtain relief from, errors of fact,[4] not appearing on the face of the record[5] and unknown to the court,[6] which errors if known in season would have prevented the rendition and entry of the judgment challenged.[7] While the writ of error coram nobis is recognized as an existing common law remedy in some jurisdictions,[8] it is almost obsolete,[9] the more convenient and sum-

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[1]Farley, "Coram Nobis-Another View," 6 Miss. L.J. 327 (1934).

[2]"The writ of error coram nobis is one of the oldest writs known to the English Common Law. Blackstone refers to it as a 'writ of most remedial nature which seems to have been invented lest in any way there should be an oppressive defeat of justice'." Central Franklin Process Co. v. Gann, 175 Tenn. 267, 133 S.W.2d 503 (1939).

[3]Mitchell v. State, 179 Miss. 814, 176 So. 742 (1937).

[4]People v. Reid, 195 Cal. 249, 232 P. 457 (1920); Mandell v. People, 76 Colo. 296, 231 P. 199 (1924); Howie v. State, 121 Miss. 197, 83 So. 158 (1919); Fugate v. State, 85 Miss. 94, 37 So. 554 (1904). "The earliest known use of the writ was to disclose misprison of clerk, infancy, coverture, or death of a party." Nikola v.Campus Towers Apartment Bldg. Corp., 303 Ill. App. 516, 25 N. E. 2d 582 (1940).

[5]Williams v. Yelvington, 103 Fla. 145, 137 So. 156 (1931); New England Furniture & Carpet Co. v. Willcuts, 55 F.2d 983 (D. Minn. 1931); Carraway v. State, 163 Miss. 639, 141 So. 342 (1932).

[6]Tatorsky v. DeVere, 78 Colo. 496, 242 P. 973 (1926); Caraway v. State, 163 Miss. 639, 141 So. 342 (1932); Badger Lumber Co. v. Goodrich, 353 Mo. 769, 184 S.W.2d 435 (1944).

[7]Tatorsky v. DeVere, 78 Colo. 496, 242 P. 937 (1926); Tweed v. Lockton, 5. Harr. 474, 167 A. 703 (Del. 1932); People v. Sullivan, 339 Ill. 146, 171 N.E. 122 (1930).

[8]Chambers v. State, 117 Fla. 642, 158 So. 153 (1938); State v. Killigan, 202 Ind. 397, 174 N.E. 808, 74 A.L.R. 637 (1931); Dabbs v. State, 63 Kan. 321, 65 P. 658 (1901); Mitchell v. State, 179 Miss. 814, 176 So. 743 (1937); Carraway v. State, 163 Miss. 639, 141 So. 342 (1932); Howie v. State, 121 Miss. 197, 83 So. 158 (1919).

mary remedy by motion having taken its place, either as a matter of practice or by express statutory provision.[10] However, in some jurisdictions the writ is expressly authorized by statute,[11] as is the case in Mississippi.[12] It is generally held that the writ of error coram nobis will not lie where there is another adequate remedy, as by motion for new trial, or in arrest of judgment, or by appeal.[13] Under Mississippi law there is no other clearly recognized procedure available for vacating a judgment and obtaining a new trial where judgment of conviction has been affirmed. Although there is authority to the effect that the writ of error coram nobis will not apply after affirmance,[14] the more general rule is that affirmance of the judgment in an appellate court is no longer necessarily fatal to the subsequent entertainment of the writ below.[15] The statute[16] expressly allowing such a procedure is the one involved in the subject case. While the writ of error coram nobis lies to obtain relief from errors of fact,[17] even after affirmance of the judgment by an appellate court,[18] it will not lie for newly discovered evidence going to the merits of the issue tried[19]. The argument for refusing the writ sought on such grounds, is that to allow it would endanger the finality of solemn judgments,[20] and open wide the door to perjury and fraud.[21] In an effort to make it not apear that the courts value their judgments more than a man's innocence, it has been suggested that if the newly discovered evidence shows that the petitioner has been wrongly convicted, it furnishes a basis for the benevolence of the pardoning power.[22] Thus, there are cases of newly discovered evidence, touching exclusively the merits of the issue tried and determined, where the court has denied relief.[23]

If the courts should find that it is within their power to grant relief, the fact that the governor may pardon should not deter them from granting that relief. Nor is a pardon always adequate relief as was pointed out

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9Linton v. State, 72 Ark. 532, 81 S.W. 608 (1904); Grandbouche v. People, 104 Colo. 175, 89 P.2d 571 (1939); Sanders v. State 85 Ind. 318, 44 Am. Rep. 29 (1882).

10See Grandbouche v. People, 104 Colo. 175, 89 P.2d 571 (1939); Sanders v. State, 85 Ind. 318, 44 Am. Rep. 29 (1882); Hawks v. State, 162 Md. 30, 157 A. 900 (1932).

11See Cates v. City of McKenzie, 176 Tenn. 313, 141 S.W.2d 471 (1940).

12Mississippi Laws 1952, c. 250, § 1-9.

1324 C.J.S., Criminal Laws, § 1606, p. 147.

14Partlow v. State, 194 Ind. 172, 141 N.E. 513, 30 A.L.R. 1414 (1923); Robertson v. Commonwealth, 279 Ky. 762, 132 S.W.2d 69 (1939)-Expressly overruled by Smith v. Buchanan, 291 Ky. 44, 163 S.W.2d 5 (1942); Lathan v. Hodges, 35 N.C. 267 (1852).

15Buckler v. State, 173 Miss. 350, 161 So. 683 (1935). See Annot., 145 A.L.R. 818.

16Miss. Laws 1952, c. 250, § 1-9.

17See note 4 supra.

18See note 15 supra.

19Meredith v. United States, 138 F.2d 772 (6th Cir. 1943); People v. Hawks, 35 Cal.2d 290, 95 P.2d 478 (1939); Mandell v. People, 76 Colo. 296, 231 P. 199 (1924); Jones v. State, 130 Fla. 645, 178 So. 404 (1939); Powers v. State, 168 Miss. 541, 151 So. 730 (1933); White v. State, 159 Miss. 207, 131 So. 96 (1930); Fugate v. State, 85 Miss. 94, 37 So. 554 (1904); Wetzel v. State, 86 So.2d 194 (1954).

20Sanders v. State, 80 Ind. 318, 44 Am. Rep. 29 (1882); Lang v. State, 92 So.2d 670 (Miss. 1957) (dissenting opinion); Humphrey v. State, 129 Wash. 509, 224 P. 937 (1924).

21Asbell v. State, 62 Kan. 209, 61 P. 690 (1900).

2244 Am. Rep. 29; Howard v. State, 58 Ark. 229, 24 S.W. 8 (1893); Sanders v. State, 85 Ind. 318, Lang v. State, 92 So.2d 670 (Miss. 1957) (dissenting opinion); Humphreys v. State, 129 Wash. 309, 224 P. 937 (1924).

23Humphreys v. State, 129 Wash. 309, 224 P. 937 (1924).

in the famous case of *Sanders v. State*.[24] It is undeniably true that the courts possess inherent power to correct their records so as to make them speak the truth.[25] Surely, in a case like the subject case, where evidence was sufficient to raise grave doubt as to petitioner's guilt, under the elementary maxim "*where there is a wrong there is a remedy*" there must be some method for granting relief,[26] and the courts should find that method, in the instant case, even if it involves impinging on judicial convenience and procedure.[27]

James K. Dukes

FEDERAL COURTS — DETERMINATION OF STATE LAW — DICTA AS CONTROLLING EVIDENCE WHERE PRIOR DIRECT DECISION IS CONTRARY

Appellant, a citizen of Mississippi, instituted a suit in tort for personal injuries in the U. S. District Court of Rhode Island for personal injuries alleged to have been suffered by him in Mississippi as a result of negligent misfeasance by the appellee, a Rhode Island corporation, in putting out in commerce without adequate care and inspecition, a dangerously defective emery wheel. The emery wheel was eventually sold to the employer of appellant as an attachment to a bench grinding machine. While appellant was operating the machine the wheel exploded and severely injured him. At the conclusion of appellant's case, appellee made an oral motion to dismiss the complaint.[1] The motion was granted by the district court, and an order was entered dismissing the complaint, from which order appeal was taken. HELD: Reversed. The district court erroneously determined the Mississippi law on the subject in following a 1928 case in point[2] which is contra to the great weight of authority today, and which has been rejected in the dicta of a more recent case.[3] *Mason v. American Emery Wheel Works,* 241 F.2d 906 (1st Cir. 1957).[4]

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[24]85 Ind. 318, 44 Am. Rep. 29 (1882). "To pardon is to exercise executive clemency; it is an act of mercy. An acquittal is the vindication of a right, the award of justice."

[25]See note 3, supra; Sanders v. State, supra note 24.

[26]See note 24 supra.

[27]McKay, Necessity for Righ of Appeal From Denial of Writ of Error Coram Nobis, 6 Miss. L.J. 143 (1933).

[1]Rule 41 (b) Federal Rules of Civil Procedure, "Involuntary Dismissal: Effect thereof. . . . After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. . . ."

[2]Ford Motor Co. v. Myers, 151 Miss. 83, 117 So. 362 (1928).

[3]E.I. Dupont de Nemours & Co. v. Ladner, 221 Miss. 378, 73 So.2d 249 (1954).

[4]Hartigan, Circuit Judge concurred stating: "We, however, have inferred from pure dicta in the DuPont case and from the status of the law elsewhere on this issue that Mississippi is prepared to discard the Ford Rule and adopt the modern rule." Contra. National Bank of Kentucky v. Louisville Trust Co., 67 F.2d 97 (6th Cir. 1933), cert. denied 291 U. S. 665, 78 L.Ed. 1056 (1933): "[M]ere dicta should not be followed as against distinct decisions to the contrary even though the dicta is of more recent origin."

Since jurisdiction was based on diversity of citizenship the district court was bound by the law of the state in which it was sitting.[5] By applying the conflict of laws rule of Rhode Island it was determined that the law of the situs of the tort would govern the action.[6] In this manner the court was brought to a consideration of Mississippi law.

Where there is a state statute or decision of the highest court of the state there is little difficulty in determining the status of the local law.[7] However, it is often difficult to determine the state law where there are no applicable decisions by the highest court of the state,[8] or where the decisions are in confusion.[9] Under these circumstances it is the duty of the federal court to consider all pertinent data available to determine the state law.[10] In the absence of controlling data in the form of decisions or statutes, the federal courts then may engage in "prophetic judgment"[11] to reach a determination of what it thinks the state court would decide if confronted by the question. Lower court decisions, and dicta in related cases are frequently considered.[12] The courts are bound to follow lower state court decisions in the absence of higher court decisions on the subject unless the court is convinced that the highest court of the state would decide otherwise after due consideration of all pertinent data.[13] In the absence of decisions to the contrary, dicta is regarded as highly persuasive but not unequivocally

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[5]Klaxon v. Stentor Electric Mfg. Co., 313 U. S. 487, 85 L.Ed 1477 (1941); Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L.Ed 1188, 114 A.L.R. 1487 (1938).

[6]Pendar v. H. & B. Af. Mach. Co., 35 R.I. 321, 87 Atl. 1, L.R.A. 1916 A. 428 (1913); Kwasniewski v. N. Y., New Haven & Hartford R. Co., 53 R. I. 144, 164 A. 558 (1933).

[7]Mutual Ben. Health & Accident Assn. v. Cohen, 194 F.2d 232 (8th Cir. 1952), cert. denied, 343 U. S. 965, 96 L.Ed 1362 (1951).

[8]Anderson v. Linton, 178 F.2d 304 (7th Cir. 1949), cited as authority for holding in the principal case; Cooper v. American Airlines, Inc., 149 F.2d 355 (2d Cir. 1945); Jackman v. Equitable Life Ins. Society of U. S., 145 F.2d 945 (3d Cir. 1944). See Berry v. Tidewater Associated Oil Co., 188 F.2d 820, (5th Cir. 1951), where court cited Texas decisions as indicative of rule Miss. court would follow.

[9]National Foam System v. Urquhart, 202 F.2d 659 (5th Cir. 1953); Yoder v. Nu-Enamel Corp., 117 F.2d 488 (8th Cir. 1941).

[10]West v. American Telephone & Telegraph Co., 311 U.S. 223, 85 L.Ed 139 (1940). See Wolkin, Conflict of Laws in the Federal Courts: The Erie Era, 94 U. of Pa. L. Rev. 293 (1946), where the author states: "What are such 'data'? A foriori, a decision of the highest court of a state is a conclusive datum unless subsequently overruled by that court." See also Note, 9 George Wash. L. Rev. 458 (1941).

[11]Russo v. Merck & Co. Inc., 138 F. Supp. 147 (R.I. 1956); Mutual Benefit Health & Accident Assn v. Cohen, 194 F.2d 232 (8th Cir. 1952); Cooper v. American Airlines, Inc., 149 F.2d 355 (2nd Cir. 1945), stating a "guessing guide" at 359; Gum v. Gunmakers of America, Inc, 136 F.2d 957 (3rd Cir. 1942). See Six Companies of California v. Joint Highway Dist. No. 13 of California, 110 F.2d 620 (9th Cir. 1940); Gultman v. Illinois Central R. Co., 189 F.2d 929 (2nd Sir. 1951) where the court followed a Supreme Court decision in absence of state decision.

[12]E.g., see Kingwood Oil Co. v. Bell, 136 F. Supp. 229 (E.D. Ill. 1955); West v. American Telephone & Telegraph Co., supra, note 9; Gettins v. U. S. Life Insurance Co., 221 F.2d 782 (6th Cir. 1955); U. S. v. Roemig, 58 F. Supp 857 (N.D. Iowa 1943), stating: "What, in an isolated opinion, may be dictum, has a way of being translated shortly by the court asserting it into settled law."

[13]West v. American Telephone & Telegraph Co., supra, note 10; King v. Order of Travelers, 333 U. S. 153, 92 L.Ed 608 (1948); Cooper v. American Airlines, 149 F.2d 355 (2nd Cir. 1945).

binding.[14] No case has been found where dicta in a more recent case has been held controlling over a prior decision on the point. In discussing dicta, the federal courts usually draw a distinction between obiter dicta and considered dicta[15] in giving accord to its weight as a binding precedent. The general rule as announced by these decisions is that it is the duty of a federal court to apply the state law as it is rather than as it should be.[16] Applying this to the instant case the problem is to determine, in the light of a direct holding on the subject, whether dicta in a later case should be recognized as the "law" of the state. Where there is a sttate highest court decision on "all fours" with the question presented it is generally regarded as conclusive data as to what the law is.[17] To counter this presumption it would appear to the writer that the dicta relied on should be clear, applicable, and unequivocal. Such dicta might then establish the state law by being the most recent evidence of what the state court has determined to be.

The same problem which arose in the instant case in determining the law of a second state by virtue of a conflict of laws rule of the forum state can also arise where a federal court must determine the substantive law of the forum state itself. The Erie doctrine assures litigants that a federal court will apply the substantive law of the forum state. But insofar as the instant case provides a novel method for determining state law in general, it *could* be used by a federal court in determining the substantive law of the forum state itself. This would mean that such a court would not be bound by outmoded state law where the highest state court has indicated by dicta that it will not be subsequently followed. Submitted that this approach will probably gain favor, but it poses difficulties as to the quantity and/or quality of dicta necessary and raises the possibility that the same result might be achieved where there is no dicta at all.

James A. Becker, Jr.

Insurance — Extent of Liability — One "Accident"

The insured, while operating his automobile, was approaching three motorcycles being driven in an echelon formation when he negligently veered over into their lane and struck each motorcycle successively. The

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[14]Handley v. The City of Hope, Arkansas, 137 F. Supp. 442 (W. D. Ark. 1956); Home Royalty Assn. v. Stone, 199 F.2d 650 (10th Cir. 1952); Safety Motors, Inc. v. Elk Horn Bank & Trust Co., 118 F.Supp. 872 (W.D. Ark. 1954), aff'd 217 F.2d 517 (8th Cir. 1954); Powell v. Maryland Trust Co., 125 F.2d 260 (4th Cir. 1942), cert. denied, 316 U. S. 711 (1942).

[15]General Electric Co. v. Hygrade Sylvania Corp., 61 F. Supp. 476 (S.D. N.Y. 1944). See Holbert v. Chase, 12 F.R.D. 171 (E.D. S.C. 1952) where the court stated, "But since it [obiter dictum] is the expression of the highest court of this state, I must accept it as the law of South Carolina." No state decisions applicable.

[16]West v. American Telephone & Telegraph Co., 311 U. S. 223, 85 L.Ed. 139 (1940), stating, ". . . the fact that the federal court feels that a directly controlling state decision is unjust or wrong, this in itself does not relieve the duty of following it."

[17]Antonnas v. Lyfford, 144 F.2d 765 (3rd Cir. 1944). See also Harnett and Thornton, Precedent in the Erie-Tompkins Manner, 24 N.Y.U. L. Q. Rev. 770 (1949).

clause of limitation under "Coverages", in the indemnity contract provided for: "Bodily Injury Liability each person $20,000.00, each accident $50,000.00. Property Damage Liability each accident $5,000.00." The insurer brought this action for a declaratory judgment to determine the extent to which, by the contract of insurance, it had agreed to nidemnify the named insured against liability to third person. HELD: There was but one accident within the meaning of the liability policy limiting coverage for each accident. *Truck Insurance Exchange v. Rohde,* 303 P.2d 659 (Wash. 1956).

The meaning of the term "accident" is the subject of litigation. It is the general rule that the terms of an accident policy should be understood in their plain, ordinary and popular sense[1] when not specifically defined in the contract. And an accident has been defined[2] as an undesigned and unforeseen occurrence of an afflictive or unfortunate character. The courts state that as commonly used in liability insurance policies, the term "accident" is predicated on an occurrence which is the cause of an injury;[3] it is used to denote cause, rather than effect, and a result is not an accident even though unexpected; the means or cause must be unexpected,[4] so that the result is the proximate consequence of a fortuitous circumstance or event.[5] In referring to loss, damage or injury as used in liability insurance policies, the reference is to that which is caused by the accident.[6] Though some perplexity arises when one attempts to define where one accident ceases and another commences,[7] a California court in considering a case where one automobile collided, in an unbroken chain of events, with two automobiles owned by different individuals, found that there was but one accident because there was but a single, continuous proximate cause.[8] A similiar decision was reached in an earlier English case where an automobile hit three pedestrians successively.[9] In the language of the court, the killing of the third person hit was but an "incident of the accident". In a recent case[10] where a truck collided with a train, derailing it and causing damage to sixteen cars belonging to fourteen separate owners, the court held this to be a single accident stating tha the normal use of the word "accident" was to describe the event, regardles of how many persons or things were involved. This decision has been followed in a U. S. District Court[11] in holding that the term "each accident", as used in a comprehensive general liability policy, referred to the cause itself; and even though fire resulted when one insured's employees upset a tar pot and caused damage to eleven

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[1]Hart v. North American Acc. Ins. Co., 154 Miss. 400, 122 So. 471 (1929).

[2]Webster's New International Dictionary (2nd ed. 1950).

[3]Hyer v. Inter-Insurance Exchange of the Automobile Club of Southern California, 77 Cal. App. 343, 246 P. 1055 (1926).

[4]Tuttle v. Pacific Mut. Life Ins. Co., 58 Mont. 121, 190 P. 993, 16 A.L.R. 601 (1920).

[5]Inter-Ocean Casualty Co. v. Foster, 147 So. 127 (Ala. 1933).

[6]Lewis v. Commercial Casualty Ins. Co., 142 Md. 472, 121 A. 259, 28A.L.R. 1287 (1923).

[7]Appleman, Automobile Liability Insurance, 210 (1938).

[8]Hyer v. Inter-Insurance Exchange of the Automobile Club of Southern California, 77 Cal. App. 343, 246 P 1055 (1926).

[9]Tinline v. White Cross Ins. Ass'n. (1921) 3 K.B. 327.

[10]Saint Paul-Mercury Indemnity Co. v. Rutland, 225 F.2d 689 (5th Cir. 1955).

[11]Tri-State Roofing Co. v. New Amsterdam Casualty Co., 139 F.Supp. 193 (W. D. Penn. 1955).

properties, there was but one "accident". The opinions of writers and judicial precedents must be given consideration when seeking the true meaning of a term;[12] and where a type policy has had national use and has had uniform judicial construction, that construction is adopted by the parties to the contract.[13]

An automobile policy is to be construed as a whole, and not by considering only certain clauses of fragmentary parts,[14] and effect should be given, if possible, to all provisions thereof.[15] Where a clause limits liability for bodily injuries to $5,000.00 each person and $20,000.00 each accident, it is obvious that the parties anticipated more than one person's being injured. It is submitted that to construe the term "accident" in an ordinary automobile liability policy so that each impact following from a single proximate cause would constitute an accident, would be an absurdity. In this modern day of highway bedlam that is exactlywhat the insurer has sought to shield himself from. It must be remembered that an insurer may limit its liability to a stipulated amount, so that regardless of the number or amount of judgments obtained, its liability will cease with the policy limits.[16] In considering the terms of an insurance contract, any interpretation that would lead to an absurd conclusion in light of the object and scope of the policy should be abandoned.

Gerald Alexander Gafford

Insurance — Failure of Insured to Comply with Condition Precedent Requiring Appraisal

Plaintiff sued defendant insurance company to recover the amount allegedly due on an automobile fire insurance policy following fire loss to his automobile. The policy contained a provision for appraisal in the event the parties could not agree on the amount of loss, and compliance with this provision was expressly made a condition precedent to insured's right to institute an action against the insurer for the amount of the loss. After appointing an appraiser in accordance with the terms of the policy, insured withdrew from the appraisal proceedings and instituted this action to recover on the policy. Held: Failure to comply with the appraisal provision barred recovery by the insured until he had made an effort to comply with that provision. *Home Insurance Co. v. Watts,* 91 So.2d 722 (Miss. 1957).

While a clause requiring the submission to arbitration of all disputes arising under a contract is revocable because it "ousts the courts of jurisdiction";[1] but it has long been recognized that provisions in insurance policies which require arbitration as to the amount of loss, without re-

[12]See note 10 supra.

[13]Stanley v. American Motorists Ins. Co., 195 Md. 180, 73 A.2d 1, 30 A.L.R.2d 268 (1950).

[14]Travelers Ins. Co. v. Ship By Truck Co., 95 F.2d 149 (5th Cir. 1938).

[15]Auto Mut. Indemnity Co. v. Show, 134 Fla. 815, 184 So. 852 (1939).

[16]Appleman, Insurance Law and Practice, § 4891 (1942).

[1]Trott v. City Ins. Co., 24 Fed. Cas. 215, No. 14, 189 (C.C.D. Me. 1860). And see Jones v. Harris, 59 Miss. 214 (1881).

gard to the question of liability, are not revocable.[2] In this country such provisions have generally been held irrevocable when framed in the language of conditions precedent.[3] Granting the clause to be a valid condition precedent, the general rule,[4] to which Mississippi conforms,[5] is that failure of the insured to comply with the provision bars his action on the policy. On the other hand, if the failure to arbitrate is the fault of the insurer,[6] or if both parties are at fault,[7] the clause ceases to operate as a condition precedent and the insured can maintain his action on the policy. Where neither party is at fault, there is a division of authority

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[2]See, e.g., Scott v. Avery, 5 H.L. 811, 10 Eng. Rep. 1121 (1856).

[3]The following jurisdictions uphold the validity of appraisal clauses as conditions precedent to the right of action on the policy: United States: Hamilton v. Liverpool & L. & G. Ins. Co., 136 U.S. 242 (1890); Alabama: Western Assurance Co. v. Hall, 112 Ala. 318, 20 So. 447 (1895); California: Adams v. South British & National Fire & Marine Ins. Co., 70 Cal. 198, 11 P. 627 (1886); Florida: Southern Home Ins. Co. v. Faulkner, 57 Fla. 194, 49 So. 542 (1909); Georgia: National Fire Ins. Co. v. Lam, 34 Ga. App. 246, 129 S.E. 116 (1925); Illinois: Lancashire Ins. Co. v. Lyon, 124 Ill. App. 491 (1906); Indiana: Providence Washington Ins. Co. v. Wolfe, 168 Ind. 690, 80 N.E. 26 (1907); Iowa: Zalesky v. Home Ins. Co., 102 Iowa 613, 71 N.W. 565 (1897); Kansas: Cowles v. Conn. Fire Ins. Co., 113 Kan. 532, 215 P. 308 (1923); Kentucky: Continental Ins. Co. v. Vallandingham, 116 Ky. 287, 76 S.W. 22 (1903); Louisiana: Hart v. Springfield Fire & Marine Ins. Co., 136 La. 114, 66 So. 558 (1914); Maine: Fisher v. Merchants Ins. Co., 95 Me. 486, 50 A. 282 (1901); Maryland: Caledonia Ins. Co. v. Traub, 83 Md. 524, 35 A. 13 (1896); Massachusetts: Paris v. Hamburg-Bremen Fire Ins. Co., 204 Mass. 90, 90 N.E. 420 (1910); Michigan: Morley v. Liverpool & L. & G. Ins. Co., 85 Mich. 210, 48 N.W. 502 (1891); Minnesota: Gasser v. Sun Fire Office, 42 Minn. 315, 44 N.W. 252 (1890); Mississippi: Franklin Fire Ins. Co. v. Brewer, 173 Miss. 317, 159 So. 545 (1890); Missouri: Mason v. Fidelity Phenix Ins. Co., 258 S.W. 759 (Mo. App. 1924); North Carolina: Pioneer Mfg. Co. v. Phoenix Assurance Co., 106 N.C. 28, 10 S.E. 1057 (1890); New Jersey: Liverpool, L. & C. Ins. Co. v. Wolff, 50 N.J.L. 453, 14 A. 561 (1888); New York: Williams v. German Ins. Co., 90 App. Div. 413, 86 N.Y.S. 98 (1904); Ohio: Phoenix Ins. Co. v. Carnahan, 63 Ohio St. 258, 58 N.E. 805 (1900); Tennessee: St. Paul Fire & Marine Ins. Co. v. Kirkpatrick, 129 Tenn. 55, 164 S.W. 1186 (1913); Texas: Scottish Union & National Ins. Co. v. Clancy, 71 Tex. 5, 8 S.W. 630 (1880); Virginia: North British & Mercantile Ins. Co. v. Rubinett & Green, 112 Va. 754, 72 S.E. 668 (1911); Washington: Goldstein v. National Fire Ins. Co., 1106 Wash. 346, 180 P. 409 (1919); Wisconsin: Chapman v. Rockford Ins. Co., 29 Wisc. 572, 62 N.W. 422 (1895).

Two states have refused to accept the irrevocability of the provisions of appraisal clauses: Nebraska: Phoenix Ins. Co. v. Zlotky, 66 Neb. 584, 92 N.W. 736 (1902); New Hampshire: Franklin v. New Hampshire Fire Ins. Co., 70 N.H. 251, 47 A. 91 (1900). But the New Hampshire rule was qualified by Salganik v. U. S. Fire Ins. Co., 80 N.H. 450, 118 A. 815 (1922), which held that if the parties go forward with an appraisal and an award is made, that award is conclusive and binding on the parties as to the amount of the loss.

The position of the Pennsylvania court is uncertain. The question of the revocability of appraisal provisions appears to rest upon the "naming" of the appraisers within the policy. Needy v. German Ins. Co., 187 Pa. 460, 47 A. 739 (1913).

Six states have statutory provisions which restrict, in varying degrees, the validity of appraisal provisions: Arkansas: Firemen's Ins. Co. v. Danis, 130 Ark. 576, 198 S.W. 127 (1917); Idaho: Douville v. Pacific Coast Cas. Co., 21 Idaho 396, 138 P. 506 (1914); Montana: Cacic v. Slovenska Narondna Podporna Jednota, 102 Mont. 438, 59 P.2d 910 (1936); Oklahoma: Seay v. Commercial Union Assurance Co., 420 Okla. 83, 140 P. 1164 (1914); South Dakota: Phenix Ins. Co. v. Perkins, 19 S.D. 59, 101 N.W. 1110 (1905); Vermont: Vermont Rev. Stat. § 9187 c. 387 (1947).

[4]See note 3 supra.

[5]Hartford Fire Ins. Co. v. Conner, 79 So.2d 236 (Miss. 1956).

[6]Providence-Washington Ins. Co. v. Kennington, 111 Miss. 244, 71 So. 378 (1916). Even an unreasonable delay in the appraisal proceedings by insurer's arbitrator may relieve the insured of the duty to comply with the provision. Providence-Washington Ins. Co. v. Wolf, 168 Ind. 690, 80 N.E. 26 (1907).

[7]Siegel v. Ins. Co. of North America, 56 N.D. 841, 219 N.W. 467 (1928).

as to the insured's right to maintain his action.[8] If, through the fault of the insured, the appraisal has failed, the parties will be required to submit to a second attempt at appraisal before an action can be brought on the policy.[9] This is accomplished, as was done in the principal case, by viewing the appraisal clause as a matter to be pleaded in abatement. This appears to be the accepted practice,[10] and is not novel within this state.[11] There is some authority, however, to the effect that failure of the insured to arbitrate may be pleaded in bar,[12] although the distinctions drawn as to when it is in bar and when in abatement are often of a tenuous nature.[13] In general the courts seem to have adopted the attitude that these appraisal clauses operate soley for the benefit of the insurer.[14] The basis of this contention is well illustrated in *Randall v. American Fire Ins. Co.*,[15] where it is shown that only the insurer can effectively demand compliance with the appraisal caluse, while the insured must comply or forego any recovery on the policy.[16] The courts, therefore, have undertaken to protect the insured from the disadvantages of this provision by holding that, inasmuch as it is drawn upon the terms desired by the insurer, it will be interpreted in a manner most favorable to the insured.[17]

By implication at least, the principal case apparently accepts these views of the appraisal provision. In treating it as a matter in abatement, the Mississippi Court evidently subscribes to the proposition that such clauses are inserted for the sole benefit of the insurer. While there is some merit to the contention that non-compliance on the part of the insured should void the policy on the theory of substantial breach, there appear to be overriding reasons for the construction which the court has placed upon this appraisal clause. In these times, automobile insurance is a practical necessity, and, while the policy is drawn in the natureof a consensual contract, in reality the insured has no choice but to accept the terms offered by the insurer, if he is to obtain coverage at all. For that reason, when a clause in the policy is found to work an undue advantage in favor of the party who is in a position to dictate the terms of that policy, here can be little quarrel with a decision which protects the

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[8]Compare Siegel, supra note 7, and Westenhave Bros. v. German-American Ins. Co., 113 Iowa 726, 84 N.W. 717 (1900). The weight of authority supports the view expressed in the former case, on the theory that the insured should not be subjected to endless, and fruitless, arbitration.

[9]Morley v. Liverpool & L. & G. Ins. Co., 85 Mich. 210, 48 N.W. 502 (1891). But see Reilley v. Agriculture Ins. Co., 311 Ill. App. 562, 37 N.E.2d 352 (1941), where, following an appraisal illegally procured by insured, the insurer was not required to submit to further appraisal.

[10]Kahnweiler v. Phenix Ins. Co., 67 F. 483 (8th Cir. 1895).

[11]Aetna Ins. Co. v. Cowan, 111 Miss. 453, 71 So. 746 (1916). See also Hartford Ins. Co. v. Conner, supra note 5.

[12]Maryland Cas. Co. v. Mayfield, 225 Ala. 449, 143 So. 465 (1932).

[13]Compare the Maryland case, supra note 12, with McCulloch v. Mill Owners' Mut. Fire Ins. Co., 243 Ala. 67, 8 So.2d 404 (1942).

[14]Sykes v. Royalty Cas. Co., 111 Miss. 746, 72 So. 147 (1916).

[15]10 Mont. 340, 35 P. 953 (1891).

[16]Id. at 959.

[17]Wallace v. German American Ins. Co., 41 F. 742 (C.C.N.D. Iowa 1882). In this connection, contrast the procedure in the Morley case, supra note 9, with that in Aetna Ins. Co. v. Jester, 37 Okla. 413, 132 P. 130 (1913), where no re-appraisal was required when the first attempt failed due to the fault of the insurer.

interests of the party who is placed at a disadvantage, while at the same time giving substantial effect to the terms of that clause.

Lawrence J. Franck

TORTS — FEDERAL TORT CLAIMS ACT — LIABILITY FOR FIREFIGHTING

Action was brought under the Federal Tort Claims Act to recover for property destroyed by fire as a result of the negligence of U. S. Forest Service firefighters. HELD: The United States was liable according to the laws of the State of Washington determining liability of a private citizen. *Rayonier, Inc., v. United States*, 77 S. Ct. 374 (1957).

The government, relying chiefly on *Dalehite v. United States*,[1] contended that government liability was not extended under the act[2] to include uniquely governmental functions, since under the act there must be an analagous private tort counterpart and that immunity of communities and other public bodies from liability for injuries due to fighting fires is "doctrinally sanctioned in the law of torts."[3] The *Dalehite* case had been preceded by *Feres v. United States*,[4] also brought under the act. But the court's decision in denying liability in the *Feres* case was based principally on the status of the litigants, who were members of the U. S. military forces, and the unique position of the army in society. The court's view seemed clear until *Indian Towing Co. v. United States*[5] which left ample room for doubt as to which direction the court might next turn. The paramount question presented by this series of cases interpreting the Federal Tort Claims Act is to the extent to which the act abolished governmental immunity already existing in the general law of torts. It seems

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[1]346 U. S. 15 (1953). The *Dalehite* case arose out of an explosion of chemicals being transported for the federal government. The court's opinion rested chiefly on the act's provision against liability in the case of a discretionary function, but the opinion also relieved the government of liability for negligence of Coast Guard firefighters who fought the blaze which resulted from the explosion.

[2]The pertinent provisions of the act are: "[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government, while acting within the scope of his office or employment, under circumstances where the United States, if a private person would be liable . . . in accordance with the law of the place where the act . . . occurred." 28 U.S.C. § 1346 (b) (1946). "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances. . ." 28 U.S.C. § 2674 (1946). "The provisions of this chapter and section 1346 (b) . . . shall not apply to any claim based upon an act or omission of an employee . . . exercising due care, in the execution of a statute or regulation . . . or based upon the exercise . . . or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved be abused." 28 U.S.C. § 2680 (a) (1946).

[3]346 U. S. at 44.

[4]340 U. S. 135 (1950).

[5]350 U. S. 61 (1955). See Note, 27 Miss. L. J. 252 (1956). The *Indian Towing* case involved the liability of the federal government for negligent operation of a lighthouse by the U. S. Coast Guard, which caused a ship to go aground and lose its cargo. The court held the government liable although there was no analagous private citizen liability due to a statute allowing noone but the federal government to operate lighthouses.

clear that the answer, which was pecking vigorously at the shell in the *Indian Towing* case, has fully emerged in the case under consideration, at least during the present composition of the court[6] or until Congress might choose to speak once more on the subject.[7] The court in the *Indian Towing* case refrained from expressly overruling the *Dalehite* case. However, in the instant case, the court reaches back, and states that *Indian Towing* overrules that part of its opinion in the *Dalehite* case which granted immunity to public firefighters,[8] and emphasized that *Indian Towing,* to the fullest measure, abolished the doctrine of "The King can do no wrong" as it applied to the federal government. The court further stated specifically that the very purpose of the act *is* to create "novel and unprecedented"[9] liabilities against the federal government, and struck down what might be considered the ultimate in governmental immunity.[10]

The case under consideration leaves little room for immunity of the federal government from suits in tort. The army — and perhaps analagous functions yet to be brought into dispute — is no doubt a special case under the *Feres* decision. But other than that the only limitations remaining are those substantial limitations[11] and procedural safeguards[12] set out by Congress.

Joe Clay Hamilton

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[6]The majority opinion in the case under consideration was written by Justice Black who concurred in Justice Jackson's dissent in the *Dalehite* case. The majority opinion in the *Indian Towing* case was written by Justice Frankfurter who also concurred in the dissenting opinion of Justice Jackson in the *Dalehite* case. In the *Dalehite* case the majority opinion was written by Justice Reed, who wrote the dissenting opinions in both the instant and the *Indian Towing* cases. The *Rayonier* case had two dissenters, the other Justice Clark. Joining Justice Reed in the *Indian Towing* dissent were Justices Burton, Clark and Minton. Justices Douglas and Clark took no part in the *Dalehite* decision. There was no dissent in the *Feres* case which seems to indicate that in reality that case gave rise to no serious consideration of the scope of the Federal Tort Claims Act.

[7]In the *Indian Towing* dissent, Justice Reed pointed out that the *Dalehite* and *Feres* cases "have not caused Congress to amend the Federal Tort Claims Act." When claims for relief arose in Congress from the catastrophe that gave rise to the *Dalehite* case, throughout the reports, discussion and enactment of the relief act, there was no effort to modify the act so as to change the law as interpreted by the court in *Feres* and *Dalehite.* "Congress must have accepted the rulings relating to the issue here involved as in accord with the understanding of the Tort Claims Act."

[8]77 S. Ct. at 377.

[9]The majority opinion in *Feres* and *Dalehite* stated that the effect of the act "is to waive immunity from recognized causes of action and was not to visit the government with novel and unprecedented liabilities."

[10]One point in Justice Reed's dissent in *Indian Towing* was that the majority opinion "logically" would cover negligence in fire fighting "although the *Dalehite* holding on that point is not overruled."

[11]28 U.S.C. § 2680 (a)- (m), 2680 (a) being the discretionary function exemption, probably the most important, and § 2680 (g) barring claims arising out of assault, battery, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

[12]28 U.S.C. § 2401 (b) . . . statuteof limitations; 2402 . . . denial of trial by jury; § 2672 . . . administrative adjudgment of claims of $1,000 or less by agency heads; 2673 . . . reports to Congress by agency heads of funds paid under the act; 2674 . . . no liability for punitive damages or for interests prior to judgment; 2675 . . . disposition by federal agency as prerequisite to suit when claim is filed; 2677 . . . compromise authorized by the Attorney General; 2679 . . . exclusiveness of remedy.

TORTS — NEGLIGENCE — COUNTY HOSPITAL — LIABILITY TO PAY PATIENT

A pay patient brought suit against a county hospital alleging negligence of hospital employees in placing excessive wax upon the floor, which caused him to fall and suffer personal injuries. Lower court dismissed for failure to state a cause of action. Plaintiff appealed. HELD: Reversed and remanded. The operation of a hospital is a proprietary function, at least so far as a pay patient is concerned, and therefore, a county hospital is liable for the negligence of its employees when it results in injury to pay patients. *Wittmer v. Letts,* 80 N.W.2d 561 (Iowa 1957).

Generally, a sovereign state and its subdivisions cannot be sued in the absence of consent by the state.[1] This immunity is founded upon the doctrine that the "king can do no wrong".[2] Counties are political subdivisions of the state, created for the purpose of discharging public duties, and are organized without regard to the consent or dissent of the inhabitants, and therefore, are immune from liability in the absence of statutory consent.[3] In applying the general rule of non-liability, courts have traditionally drawn a distinction between what are termed "governmental" and "proprietary" functions,[4] the governmental entity being held liable where the causing function is deemed to be of a "proprietary" nature.[5] "Governmental" functions are usually classed as such if they meet the following criteria: (1) if the function benefits the public at large;[6] (2) if it is demanded by the state;[7] (3) if it is one normally exercised by a sovereign;[8] (4) if the function is discretionary, political, or legislative;[9] or (5) does not gain some advantage, pecuniary or otherwise.[10] The same criteria may be negatively stated as tests for "proprietary" functions. It is apparent that there is a wealth of sophistry concerning the attributes of the two functions. And the truth of the matter is that the various results in the cases follow no logical or consistent patterns. "Governmental" functions range from the maintenance of toboggan slides[11] to the operation of hospitals[12] and provision for police protec-

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[1]See, e.g., State v. Woodruff, 170 Miss. 442, 157 So. 897 (1948).

[2]Langford v. United States, 101 U.S. 341, 25 L. Ed. 1010 (1879); Morgan v. United States, 81 U. S. (14 Wall.) 531, 20 L.Ed. 738 (1871); Gibbons v. United States, 75 U. S. (8 Wall.) 269, 19 L .Ed. 453 (1869). See also Borchard, "Governmental Liability in Tort", 34 Yale L. J. 129 (1924) for comprehensive commentary and historical development.

[3]State v. Sanders, 203 Miss. 475, 35 So.2d 529 (1948); Lee County v. Payne, 175 Miss. 12, 166 So. 332 (1936); Pidgeon-Thomas Iron Co. v. Leflore County, 135 Miss. 155, 99 So. 677 (1924).

[4]In the absence of a statute abrogating immunity.

[5]"A county is not liable, in the absence of a statute, for torts committed by it in exercise of its governmental functions; but it is liable for torts committed in a proprietary capacity. . ." 20 C.J.S., p. 1067.

[6]See, e.g., McLeod v. City of Duluth, 174 Minn. 184, 218 N.W. 892 (1928).

[7]See, e.g., War Memorial Hospital of Dist. No. 1 v. Board of Commissioners, 73 Wyo. 371, 279 P.2d 472 (1955).

[8]See, e.g., City of Bay Minette v. Quinby, 263 Ala. 188, 82 So.2d 192 (1955).

[9]See, e.g., Britt v. Bity of Wilmington, 236 N.C. 446, 73 S.E.2d 289 (1952).

[10]See, e.g., Harvard Furniture Co. v. City of Cambridge, 320 Mass. 227, 68 N.E.2d 684 (1946).

[11]Pohland v. City of Sheboygan, 251 Wis. 20, 27 N.W.2d 736 (1947).

tion.[13] These distinctions, however, have no application to county hospitals in Mississippi. Counties in Mississippi are not liable for the negligent or tortious acts of their officers and agents except as authorized expressly or by implication from some statute.[14] Boards of trustees operating municipal hospitals have been held to be engaged in a "governmental" function[15] but this test has never been applied to a county hospital. The fact that a patient in a county hospital pays for the service he receives has no effect upon the immunity of the hospital from liability.[16] A possible departure from the ironclad immunity is found in the statutes authorizing the establishment and maintenance of city, county, and joint hospitals.[17] These statutes authorize the boards of trustees to purchase such liability insurance as they deem advisable, and suit is authorized, but only to the extent of the insurance coverage.[18] These statutes do not require counties or municipalities to establish and maintain hospitals, and something may be said for the argument that, since these are not mandatory duties, the operation of a hospital is a "proprietary" function.[19] But it may be concluded with comparative safety that Mississippi counties operating hospitals may be liable for tort actions only when the board of trustees has provided for liability insurance.[20]

Mississippi has taken a progressive step by authorizing the purchase of liability insurance and recognizing the doctrine that the "injured should be made whole". This approach could well be extended to other areas of governmental operation, thereby giving the word "sovereign" a meaning which does not include injury without responsibility.[21] A novel proposal worthy of consideration is that municipalities and counties be required to contribute to a state fund on an actuarial basis for the mutual indemnification of governmental entities against tort actions.[22]

M. Curtiss McKee

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[12]Jones v. City of Amory, 184 Miss. 161, 185 So. 237 (1939).

[13]General Petroleum Corp. v. City of Los Angeles, 22 Cal. App. 2d 332, 70 P.2d 998 (1937).

[14]Simpson County v. Kelly, 175 Miss. 596, 166 So. 532 (1936).

[15]Jones v. City of Amory, 184 Miss. 161, 185 So. 237 (1939); Bradley v. City of Jackson, 153 Miss. 136, 119 So. 811 (1929).

[16]This point is brought out by strong implication in a recent Mississippi decision. City of Leland v. Leach, 86 So.2d 363 (Miss. 1956).

[17]Miss. Code Ann. §§ 7129-55, 3002.3 (1942).

[18]"[I]f liability insurance is in effect [the hospital] may be sued by anyone affected to the extent of such insurance carried; but provided, however, that immunity from suit is only waived to the extent of such liability insurance carried." Miss. Code Ann. § 7129-55 (1942). Section 3002.3 of Miss. Code Ann. (1942) states emphatically that "[S]uch immunity as presently exists is specifically retained and recognized. . . ."

[19]Henderson v. Twin Falls County, 56 Idaho 124, 50 P.2d 597 (1935).

[20]An excellent commentary on the governmental operation of hospitals and there liability for torts is contained in 25 A.L.R.2d 203 (1952).

[21]For further information on the legal status of counties, see Johnston, "Legal Principles Governing County Boards of Supervisors," 21 Miss. L.J. 340 (1950).

[22]Additional proposals on this subject and a tentative draft of a suggested statute may be found in Borchard, "State and Municipal Liability in Tort — Proposed Statutory Reform," American Bar Association Journal (Dec. 1934), p. 747.

TORTS — NEGLIGENCE — LIABILITY TO WIFE FOR LOSS OF CORSORTIUM

Action by wife for damages for loss of consortium with her husband, allegedly due to defendant's negligent injury of her husband. HELD: A wife's petition for damage for loss of consortium against one who by his negligence had permanently incapacitated her husband, stated a cause of action. *Acuff v. Schmit,* 78 N.W. 2d 480 (Iowa 1956).

The great majority of decisions hold that a wife may not recover for loss of consortium due to the negligent injury of her husband by a third person.[1] The majority rule of today has persisted by virtue of the legal theory that the damages to the wife are too remote and consequential;[2] the argument that the tort-feasor would be subjected to a double liabilityis often advanced.[3] However, when the damage done to the wife is intentional, depriving her of her spouse's affections, the courts consider this a good cause of action (alienation of affection). In order to recover for this loss of consortium due to intentional injury, the plaintiff must

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[1]Jeune v. Del E. Webb Const. Co., 217 F.2d 515 (1954); Josewoki v. Midland Constructors Inc., 117. F.Supp. 681 (S.D.S.D. 1953); Tyler v. Brown Service Funeral Homes Co., 250 Ala. 295, 34 So.2d 203 (1948); Giggey v. Gallagher Transp. Co., 101 Colo. 258, 72 P.2d 1100 (1937); Marri v. Stanford St. R. Co., 84 Conn. 9, 78 A. 582, 33 L.R.A., N.S. 1042, Ann. Cas. 1912B, 1120 (1911); Sobelwski v. German, 2W.W. Harr. 540, 32 Del. 540, 127 A.49 (1924); McDade v. West, 80 Ga. App. 481, 56 S.E. 2d 299 (1949); Boden v. Del-Mar Garage, 205 Ind. 59, 185 N.E. 860 (1933); Brown v. Kistleman, 177 Ind. 692, 98 N.E. 631, 40 L.R.A., N.S., 963 (1912); Cravens v. Louisville & N.R. Co., 195 Ky. 257, 242 S.W. 628 (1922); Emerson v. Taylor, 133 Md. 192, 104 A.538, 5 L.R.A. 1045 (1918); Gearing v. Berkson, 223 Mass. 257, 111 N.E. 785, L.R.A. 1916D, 1006 (1916); Bolger v. Boston Elevated R.R. Co., 205 Mass. 420, 91 N.E. 389 (1910); Feneff v. New York Cent. & H.R.R. Co., 203 Mass. 298, 89 N.E. 436, 24 L.R.A. N.S. 1024, 133 Am.St. Rep. 291 (1909); Hasker v. Bushouse, 254 Mich. 187, 236 N.W. 222 (1931); Eschenbach v. Benjamine, 195 Minn. 378, 263 N.W. 154 (1935); Nash v. Mobile & O.R. Co., 149 Miss. 823, 116 So. 100, 59 A.L.R. 676 (1928); Burnhardt v. Perry, 276 Mo. 612, 208 S.W. 462, 13 A.L.R. 1320 (1919); Gambino v. Manufacturer's Coal & Coke Co., 175 Mo. App. 653, 158 S.W. 77 (1913); Stout v. Kansas City Terminal R. Co., 172 Mo. App. 113, 157 S.W. 1019 (1913); Tobiassen v. Polley, 96 N.J.L. 66, 144 A.153 (1921); Helm Stetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945); McDaniel v. Trent Mills, 197 N.C. 342, 148 S.E. 440 (1929); Hinnant v. Tide Water Power Co., 189 N.C. 120, 126 S.E. 307 (1925); Maloy v. Foster, 169 Misc. 964, 8 N.Y. S.2d 608 (1945); Landwehr v. Barbas, 241 App. Div. 769, 270 N.Y. Supp. 534 (1934); Goldman v. Cohen, 30 Misc. 336, 63 N.Y. Supp. 459 (1900); Smith v. Nicholson Bldg. Co., 93 Ohio St. 101, 112 N.E. 204, L.R.A. 1916E, 700 Ann. Cas. 191D, 206 (1915); Howard v. Verdigris Valley Electric Co-op., 207 P.2d 784 (Okla. 1949); Shared v. Oregon Electric Ry. Co., 137 Or. 341, 2 P.2d 916 (1931); Kosciolek v. Portland Ry., Light & Power Co., 81 Or. 517, 160 P.132 (1916); Ash v. S. S. Mullen Inc., 43 Wash. 2d 345, 261 P.2d 118 (1953).

[2]McDade v. West, 80 Ga. App. 481, 56 S.E. 2d 299 (1949); Boden v. Del-Mar Garage, 205 Ind. 59, 185 N.E. 860 (1933); Brown v. Kistleman, 177 Ind. 692, 98 N.E. 631, 40 L.R.A., N.S., 963 (1912); Feneff v. NewYork Cent. & H. R.R. Co., 203 Mass. 298, 89 N.E. 436, 24 L.R.A. N.S. 1024, 133 Am.St. Rep. 291 (1909); Gambino v. Manufacturer's Coal & Coke Co., 175 Mo. App. 653, 158 S.W. 77 (1913); Stout v. Kansas City Terminal R. Co., 172 Mo. App. 113, 157 S.W. 1019 (1913); Smith v. Nicholson Bldg. Co., 93 Ohio St. 101, 112 N.E. 204, L.R.A. 1916E, 700 Ann. Cas. 1918D, 206 (1915); Howard v. Verdigris Valley Electric Co-op., Okla., 207 P.2d 784 (1949); Kosciolek v. Portland Ry., Light & Power Co., 81 Or. 517, 160 P. 132 (1916).

[3]Foot v. Card, 58 Conn. 1, 18 A. 1027, (1889); Giggey v. Gallagher Transp. Co., 101 Colo. 258, 72 P.2d 1100 (1937); Feneff v. New York Cent. & H. R.R. Co., 203 Mass. 298, 89 N.E. 436, 24 L.R.A. N.S. 1024, 133 Am.St. Rep. 291 (1909); Hartman v. Cold Spring Granite Co., 77 N.W.2d 651 (Minn. 1956); Eschenbach v. Benjamine, 195 Minn. 378, 263 N.W. 154 (1935); Burnhardt v. Perry, 276 Mo. 612, 208 S.W. 462, 13 A.L.R. 1320 (1919); Stout v. Kansas City Terminal R. Co., 172 Mo. App. 113, 157 S.W. 1019 (1913); Tobiassen v. Polley, 96 N.J.L. 66, 114 A. 153 (1921); McDaniel v. Trent Mills, 197 N.C. 342, 148 S.E. 440 (1929).

show three things: (a) wrongful conduct of defendant, (b) loss of affection or consortium, and (c) causal connection between the conduct and the loss.[4] There have been only four cases allowing the wife to maintain a suit for negligent invasion of her right of consortium,[5] and of these[6] has been effectively overruled.[7] In Mississippi, there is no such action.[8]

Where there is an intentional wrong, depriving the wife of her spouse's affections, she has a cause of action. But where, as in the instant case, there has been a negligent act and the husband has been fully compensated for his injuries, there should be no recovery by the wife. The wife is not, nor has she ever been, entitled to the services of her husband. She *is* entitled to support, but the tort-feasor is liable to the husband for any loss of earnings which he may have suffered. Thus, if the wife is permitted to recover, either there is a double recovery, or recovery for loss of love and companionship alone, either one of which is undesirable. Submitted that Mississippi has held correctly on this point of law.

Ross Barnett, Jr.

TORTS — NEGLIGENCE — MANUFACTURER'S LIABILITY

The defendant G. Bernd Company was engaged in the business of processing, mixing, preparing, and packaging animal feeds which it sold and distributed to retail dealers with the intention of their being sold to the general public. Among other feeds which the defendant manufactured and offered for sale was one which the defendant placed on the market under the name of "Bernd's Mineral Supplement". This supplement contained degeletanized bone meal, a frequent and dangerous source of anthrax infection,[1] which facts defendant knew. Defendant also had notice of outbreaks of anthrax in the United States only months before its sale of feed to the Nevill Feed Company of Savannah, Georgia, on or about March 24, 1952.[2] Plaintiff, David C. Rahn, purchased five bags of the feed from Nevill Feed Company on April 11, 1952, for use as a sup-

[4]Rank v. Kuhn, 236 Iowa 854, 20 N.W.2d 72 (1945); Maahs v. Shultz, 207 Wisc. 624, 242 N.W. 195 (1932).

[5]Cooney v. Moomaw, 109 F. Supp. 448 (D. Nebr. 1953); Hitaffer v. Argonne, 183 F.2d 811 (D. C. Cir. 1950); Brown v. Georgia-Tennessee Coaches Inc., 88 Ga. App. 519, 77 S.E. 2d 24 (1953); Hipp v. E. I. Dupont de Nemours & Co., 182 N. C. 9, 108 S.E. 318 (1921).

[6]Hipp v. E. I. Dupont de Nemours & Co., 182 N.C. 9, 108 S.E. 318 (1921).

[7]Helm Stetler v. Duke Power Co., 224 N.C. 821, 32 S.E. 2d 611 (1945); McDaniel v. Trent Mills, 197 N.C. 342, 148 S.E. 440 (1929); Hinnant v. Tide Water Power Co., 189 N.C. 120, 126 S.E. 307 (1925).

[8]Nash v. Mobile & O.R. Co., 149 Miss. 823, 116 So. 100, 59 L.R.A. 676 (1928).

[1]Bacillus anthracis, or anthrax, called milzbrand, splenic fever, carbuncular fever, malignant pustule, charbon, woolsorters' disease, ragsorters' disease, blackleg, quarter evil, black quarter, black squal, rauschbrand, and bloody murrain, is an acute infectious disease of animals, especially cattle, swine, and sheep. It is transimissible to human beings. See Bacon v. United States Mut. Acc. Ass'n, 123 N.Y. 304, 25 N.E. 399 (1890).

[2]In January of 1952, outbreaks of anthrax were traced by the departments of agriculture of Illinois, Indiana, Iowa, Michigan, and Ohio, to infection originating from feeds containing bone meal. Information as to the nature of such outbreaks and their causes was widely disseminated to those in the feed industry by news releases, bulletins, trade magazines, and by announcements at meetings held by organizations connected

plement in the preparation of a dairy feed for his cattle. As a result of the animals' eating the feed containing bacillus anthracis, plaintiff was damaged in the amount of $39,430. HELD: If a manufacturer of animal feed to be sold to the public negligently puts therein substances or minerals that will kill or injure the animals, the manufacturer is liable. *G. Bernd Company v. D. C. Rahn*, 96 S.E.2d 185 (Georgia 1956).

In rare instances a warranty theory is applied in actions against a remote manufacturer or vendor. In Mississippi an "implied warranty" is raised against the remote manufacturer in the single instance of food for human consumption,[3] the court basing its conclusion on the paramount importance of human life and health.[4] At least one case refuses to raise the "implied warranty" against a remote manufacturer of animal feed.[5]

In most instances a negligence theory is applied. The "general rule" is often stated as being that a manufacturer is not liable to a third person, with whom he has no contractual relation, for negligence in the manufacture of an article.[6] But the rule is so fraught with exceptions that it might be said not to exist,[7] and the trend foretells its total obliteration.[8] Should a Mississippi plaintiff attempt to avail himself of an action in negligence under the instant or similar facts, his action might be denied on the ground that there is no exception to the general rule in his case.[9]

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with the feed industry, such as the Indiana State Renderers Ass'n and the National Independent Meat Packer's Ass'n. Various states, particularly Indiana, Virginia, and Iowa issued warnings to feed manufacturers and processors against the incorporation of bone meal into feeds for animals without making certain that such bone meal had been treated sufficiently to destroy any bacilli anthracis which might be contained therein.

[3]See Biedenharn Candy Co. v. Moore, 184 Miss. 721, 186 So. 628 (1939); Coca-Cola Bottling Works v. Simpson, 158 Miss. 390, 130 So. 479 (1930); Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927); Rainwater v. Hattiesburg Coca-Cola Bottling Co., 131 Miss. 315, 95 So. 444 (1923); Jackson Coca-Cola Bottling Co. v. Chapman, 106 Miss. 864, 64 So. 791 (1914). It is difficult to sustain this "implied wararnty" in theory, since the traditional common law implied warranty arises from *contractual* relations between plaintiff and defendant. Where there are no such relations it certainly strains the concept to apply it. But the result is desirable, since it establishes for the plaintiff, who has little access to the facts, a simple prima facie case, as does the *MacPherson* case. See also Comment, "Implied Warranties of Reasonable Fitness in Mississippi", 28 Miss. L. J. 53 (1956).

[4]See supra note 3.

[5]See Royal Feed & Milling Co. v. Thorn, 142 Miss. 92, 107 So. 282 (1926).

[6]See, e.g., E. I. Dupont de Nemours & Co. v. Ladner, 221 Miss. 378, 73 So.2d 249 (1954). The rule is stated in 65 C.J.S., Negligence § 100a (1950).

[7]See 65 C.J.S., Negligence §§ 100b, c, d, e.

[8]See MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). This approach, although it is difficult to tell whether it proceeds on a theory of contract or tort, establishes for the plaintiff a simple prima facie case, which smacks of warranty, res ipsa loquitur, and "absolute liability." See also Crane Co. v. Davies, 242 Ala. 570, 8 So.2d 196 (1942); Sheward v. Virtue, 20 Cal. 2d 410, 126 P.2d 345 (1942); Van Dorn v. W. H. Jackson Auto Sales, Inc., 283 N.Y. 628, 28 N.E.2d 33 (1940); Miles v. Chrysler Corp., 238 Ala. 359, 191 So. 245 (1939).

[9]The only exception so far recognized in Mississippi is in the case of food, drugs, etc. for human consumption, and this is on the "implied warranty" theory.

There has been some inclination toward the "dangerous instrumentality" exception, but the same case evincing this inclination holds on the basis of a prior case that an automobile is not such an instrumentality. See Ford Motor Co. v. Myers, 151 Miss. 73, 117 So. 362 (1928). See also W. T. Pate Auto co. v. W. J. Westbrook Elevator Co., 142 Miss. 419, 107 So. 552 (1926) (elevator allegedly negligently constructed); Cone v. Virginia-Carolina Chemical Corporation, 178 Miss. 816, 174 So. 554 (1937) (fertilizer injured plaintiff farmer's hands).

It is submitted, however, that the case of *E. I. Dupont de Nemours & Co. v. Ladner*[10] indicates a contrary result. In that case the court discussed both the "implied waranty" and the negligence approach, and reasoned that since there was no proximate cause *neither*[11] theory would support an action. The court expressly refused to determine whether there might have been liability had the causal relation been sufficient. But the inference from the "considered dicta" is that a negligence theory is to be preferred except in the case of articles for human consumption. And the further and more important inference is that the court intends to allow suit aginst remote manufacturers in a much more liberal manner than before. In the event negligence is made the basis of such actions it is to be hoped that the court will take into consideration the disparity of factual knowledge existing between plaintiff and defendant in determining the requisites of plaintiff's prima facie case.[12]

Ralph I. Lawson
Lester Stanley Cook, Jr.

TORTS — NEGLIGENCE — STOCKOWNER'S LIABILITY TO MOTORIST

Appellant motorist suied appellee for injuries sustained when automobile which appellant was driving collided with appellee's bull on a state aid road. The amended declaration alleged that the vehicle struck the bull on the road after the bull suddenly appeared from the woods, that appellee was negligent in failing to keep the bull fenced in, that appellee had been warned about stock being on a public road and that the fence was out of repair, and that the accident was cause by the negligence of appellee in failing to keep his animal fenced in and off the highways. The trial court found that the amended declaration did not state a cause of action and sustained appellee's demurrer. HE D: Affirmed. The declartion did not state a cause of action under the statute regarding livestock on highways[1] nor under sections of the general stock laws[2] and was insufficient to allege that appellee should have anticipated that injury would result to persons or property on the highway because of the animal escaping. For this last reason it is not necessary in this case to say whether there may be cases where owners of animals who negligently permit them to be at large on highways may be liable under the common

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[10]221 Miss. 378, 73 So.2d 249 (1954). This case also involved a remote manufacturer of animal food.

[11]This is somewhat anomalous in view of the cases unequivocally holding that the hybrid "implied warranty" rests in contract rather than tort. See Coca-Cola Bottling works v. Simpson, 158 Miss. 390, 130 So. 479 (1930); Rainwater v. Hattiesburg Coca-Cola Bottling Co., 131 Miss. 315, 95 So. 444 (1923).

[12]It would appear that the doctrine or res ipsa loquitur might be used. See, e.g., Ballard & Ballard Co. v. Jones, 246 Ala. 478, 21 So.2d 327 (1945).

[1]"It shall be unlawful for any person owning or having under control any livestock to permit such livestock to run at large on the highways or highway rights-of-way of this state maintained by the state highway commission, except as provided in section 4 herein." Miss. Code Ann. § 4876.5 (1942). (The court held that "state aid roads" are not included in the statute; this statute will not be discussed further).

law for injuries inflicted to motorists. *Pennyan v. Alexander,* 91 So.2d 728 (Miss. 1957).

Only doubtful authority exists in support of the proposition of applying absolute liability to owners of livestock under similar livestock statutes.[3] Courts have generally held that such statutes are not violated in the absence of negligence by the owner of the livestock,[4] and the decision here seems proper from this view. But, the court's pronouncement that the statutes[5] apply only to damage done to the crops of others and the like[6] and do not apply to injuries to motorists traveling on the highways is not as clear. Only a small minority of jurisdictions adhere to this rule.[7] The weight of authority seems to be that such statutes *are* intended for prevention of accidents to motorists using the highways, and where an accident occurs as a result of violation of such statutes a presumption of negligence on the part of the owner of the animal arises which is sufficient to carry the case to the jury.[8] This presumption is rebuttable on a showing of due care by the owner of the animal.[9] Further, disregard of a statutory duty may be material evidence of negligence even though the injury complained of is not within the purview

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[2]Owners of livestock "[S]hall not permit such livestock to run at large upon the open or unfenced lands of another person, except as herein expressly provided, but shall keep such livestock confined in a safe inclosure or upon lands belonging to such person." Miss. Code Ann. § 4864 (1942).

Every owner of livestock "[S]hall be liable for damages for all injuries and trespasses committed by such animals by breaking and entering into or upon the lands, grounds, or premises of another person; and the person injured shall have a lien upon the animal, or animals, trespassing for such damages." Miss. Code Ann. § 4871 (1942). (The court found that neither of the above statutes were designed for the protection of motorists, but were for the protection of agricultural crops, etc.).

[3]See note 2 supra and Farrell v. Crawford, 222 Ill. App. 499 (1921).

[4]Poongetti v. Spraggins,[a] 215 Miss. 397, 61 So.2d 158, 34 A.L.R.2d 1277 (1952); Dollarhide v. Knight, 216 Miss. 318, 62 So.2d 367 (1954) (court relied in part on use of word "permit" in statute); Favre v. Medlock, 212 Ark. 911, 208 S.W.2d 439 (1948); Stewart v. Wild, 196 Iowa 678, 195 N.W. 266 (1923); Wigginton v. Bruce, 174 Ky. 691, 192 S.W. 850 (1917); Wedel v. Johnson, 196 Minn. 170, 264 N.W. 689 (1936); Moynahan v. Wheeler, 117 N.Y. 285, 22 N.E. 702 (1889); Carpenter v. Biedekapp, 186 Misc. 5, 61 N.Y.S.2d 419 (1945); Gardner v. Block, 217 N.C. 573, 9 S.E.2d 10 (1940); Lightsey v. Radtke, 219 S.W.2d 841 (Tex. Civ. App. 1949); Rice v. Turner, 191 Va. 601, 62 S.E.2d 24 (1950).

[5]See note 2 supra.

[6]Pennyan v. Alexander, 91So.2d 728, 731 (Miss. 1957).

[7]Anderson v. Nesbitt, 43 Ind. App. 703, 88 N.E. 523 (1909); Zumstein v. Shrumann, 22 Ont. Rep. 263 (1894); Marsh v. Koons. 78 Ohio St. 68, 84 N.E. 599 (1908).

[8]Kitchens v. Elliott, 114 Ala. 290, 21 So. 965 (1887); Brotemarkle v. Snyder, 99 Cal. App.2d 388, 221 P.2d 992 (1950); Griffin v. Benton, 92 Ga. App. 167, 88 S.E.2d 287 (1955); Strait v. Bartholomew, 195 Iowa 377, 191 N.W. 811 (1923); Stewart v. Wild, 196 Iowa 678, 195 N.W. 266 (1923); Hansen v. Kemmish, 208 N.W. 277 (Iowa 1926); Wigginton v. Bruce, 174 Ky. 691, 192 S.W. 850 (1917); Jewett v. Gage, 55 Me. 538, 92 Am. Dec. 615 (1868); Leonard v. Doherty, 174 Mass. 565, 55 N.E. 461 (1899); Shipley v. Colclough, 81 Mich. 624, 45 N.W. 1106 (1890); Fallon v. O'Brien, 12 R.I. 518, 34 Am. Rep. 713.

[9]Ibid.

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[a]The common law rule that owners of livestock were bound to restrain them from entering another's premises does not apply in Mississippi. An owner of cattle may rightfully allow his cattle to pasture upon the neighboring range in this state.

The contention was made here that the doctrine of res ipsa loquitur applys where there is a violation of the statutes but the court fails to make any satisfactory statement in reply. Therefore, it does not seem safe to draw any conclusion on this point.

of the statute.[10] In the light of these facts it sems obvious that there is ample authority to support a different interpretation of the applicability of these statutes[11] if the court had chosen to do so. Considering the heightened dangers of modern highway conditions it seems nearsighted to construe the statutes narrowly.

At common law the owner of domestic animals is under no legal duty to restrain them from straying onto the highways unless he has knowledge of some vicious propensity of the animal,[12] and he is not liable for damages for an injury resulting from its being at large unless he should have reasonably anticipated that injury would result from his negligent act.[13] But, because of the way courts have used the concept, the vicious propensities of the bull — though real enough to this writer — are not such propensities as those which have traditionally brought the concept into play. Consequently the courts have not applied it, but it persents a possible avenue for exacting "absolute liability."

Assuming the interpretation of the statutes[14] is proper, and ignoring the question of vicious propensity, we are left with negligence as the gist of any action. In Mississippi one is not liable for a negligent act unless the act was the proximate cause of the injury complained of, which means in part that one could have reasonably anticipated injury (not necessiarily the particular injury which occurred) as a result of the negligent act.[15] This rule is in agreement with the weight of authority.[16] The statute requires no specific form as to the declaration, but only a concise statement of the facts constituting the cause of action.[17] A majority of jurisdictions have statutes similar to this, and the interpretation of them has been liberally in favor of the pleader so long as the substance which makes up his cause of action is stated.[18] This is evidenced by the fact

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[10]See Union Pacific Railway v. McDonald, 152 U.S. 262, 38 L. Ed. 434 (1893); Georgia Railroad Co. v. Williams, 74 Ga. 723 quoted in Lonergen v. Ill. Cent. Railroad Co., 87 Iowa 755, 49 N.W. 852, 53 N.W. 236, 17 L.R.A. 254; Hansen v. Kemmish, 208 N.W. 277 (Iowa 1926).

[11]See note 2 supra.

[12]Dyer v. Mudgett, 118 Me. 267, 107 A. 831 (1919); Holden v. Shattuck, 34 Vt. 336 (1861); Higgins v. Searle, 100 L.T.R. (n.s.) 280 (1909); Hadwell v. Richton, 2 K. B. 345 (1907); Jones v. Leed, 106 L.T.R. (n.s.) 123 (1911); Ellis v. Banyard, 106 L.T.R. (n.s.) 51 (1911).

[13]Ibid.

[14]See note 2 supra.

[15]Wright v. Ill. Cent. Railway Co., 196 Miss. 150, 16 So.2d 381 (1944); Mauney v. Gulf Refining Co., 193 Miss. 421, 8 So.2d 249 (1942); Williams v. Lumpkin, 169 Miss. 146, 152 So. 842 (1934); D'Antoni v. Albritton, 156 Miss. 758, 126 So. 836 (1930).

[16]Hook v. Reynolds, 203 Ark. 259, 156 S.W.2d 242 (1942); Duncan v. Montgomery Ward & Co., 108 F.2d 848 (8th Cir. 1940); Salt River Valley Water Users' Ass'n. v. Cornum, 49 Ariz. 1, 63 P.2d 639 (1937); Lozano v. Pacific Gas & Elect. Co., 70 Cal. App.2d 415, 161 P.2d 74 (1945); Clemens v. Western Union Telegraph Co., 3 Terry 138, 28 A.2d 899 (Del. Super. 1942); Tankersley v. Southern Railway Co., 73 Ga. App. 88, 35 S.E.2d 522 (1945); Lavelle v. Grace, 348 Pa. 175, 34 A.2d 498, 150 A.L.R. 366 (1943); Moyers v. Ogle, 24 Tenn. App. 682, 148 S.W.2d 637 (1941).

[17]"The Declaration. — The declaration shall contain a statement of the facts constituting the cause of action, in ordinary and concise language, without repetition; and if it contains sufficient matter of substance for the court to proceed upon the merits of the cause it shall be sufficient; and it shall not be an objection to maintaining any action that the form thereof should have been different." Miss. Code Ann. § 1464 (1942).

[18]See Wolf v. Smith, 149 Ala. 457, 42 So. 824 (1906); Clark v. Goddard, 39 Ala. 164, 84 Am. Dec. 777 (1863); Green v. Palmer, 15 Cal. 411, 76 Am. Dec. 492 (1860);

that courts have held that matter which is clearly implied is as much a part of the pleading as that which is expressed.[19] Nowhere has it been found that forseeability must be specifically alleged in the declaration. In view of these facts, it is difficult to ascertain in just what respect the declaration is lacking.

From the facts alleged in the declaration foreseeability would appear to be a compelling inference. It was stated that appellee had been warned about his stock being on public highways but had made no attempt to control the stock, and that his fence was out of repair. From these facts the court is asked to draw the inference — and foreseeability of unforeseeability is *always necessarily an inference from alleged facts* — that the defendant should reasonably have anticipated that the injury would occur. It is incredible in this day and time to say that a defendant should not reasonably anticipate injury from livestock straying onto the public roads, when he has been warned of previous such occurrences *and* knows that his fence is down. What *additional* facts are *possible?* It is submitted that *less* facts should be sufficient. The court stated that it was not necessary to decide if there may be cases where owners of livestock who negligently allow them to stray onto the highways may be liable under the common law where no statute is violated, and then held that the declaration did not state sufficient common law cause of action. Therefore, theoretically, the question of liability of livestock owners in these situations is still open as regards common law negligence. However, if it were not for this express statement by the court we would think from this decision that the question had been decided.

Fred C. De Long, Jr.

Wrongful Death — Deductibility of Living Expenses of Deceased

Plaintiff's decedent, a 73 year old man, was struck and killed by a train of defendant railroad. His life expectancy at the time of his death was 7.64 years. His earning capacity for the five years next preceding his death was $3,265.42 per annum. He left surviving his widow, the plaintiff, 67, and one married daughter, 47. Plaintiff, as executrix of the estate, sued under the wrongful death statute[1] and got a verdict of $25,000.00. Held:

Robinson Consol. Min. Co. v. Johnson, 13 Colo. 258, 22 P.459 (1889); Fortune v. English, 226 Ill. 262, 80 N.E. 781 (1907); Hauser & Haines Mfg. Co. v. McKay, 53 Wash. 337, 101 P. 894 (1909).

[19]See Daniels v. Tearney, 102 U. S. 415, 26 L. Ed. 187 (1880); Binney v. Globe Nat. Bank, 150 Mass. 574, 23 N.E. 380 (1890); Siegel v. Lauer, 148 Pa. 236, 23 A. 996 (1892); Atwood v. Cox, 88 Utah 437, 55 P.2d 377 (1936).

[1]Miss. Code Ann. (1942) § 1453 as amended by Miss. Laws, 1952, ch. 248. For a comparison of similar statutes in other juirsdictions, see; Ala. Code tit. 7, § 123 (1940); Alaska Comp. Laws Ann. § 61-7-3 (1949); Ariz. Code Ann. § 31-101 (1939); Ark. Stat. Ann. § 27-903 (1947); West's Ann. Cal. Code Civil Proc. § 377 (1954); Colo. Stat. Ann. c. 50, § 2 (1935); Conn. Gen. Stat. § 8296 (1949); Del. Code Ann. tit. 10, § 3704 (1953); D.C. Code Ann. § 16-1201 (1951); Fla. Stat. § 768.01 (1951); Ga. Code Ann. § 105-1302 (1947); Hawaii Rev. Laws c. 221: § 10486 (1945); Idaho Code Ann. § 5-311 (1948); Ill. Rev. Stat. c. 70, § 1 (1953); Ind. Ann. Stat. § 2-404 (Burns, Supp. 1953); Iowa Code Ann. §§ 611.20-22 (1950); Kan. Gen. Stat. § 60-3203; Ky. Rev. Stat. § 411-130 (1948); La.

(1) The verdict was not so excessive as to evince bias, passion or prejudice on the part of the jury, and (2) (via dictum) living expenses of a decedent are not a deductible item in determining the value of the life expectancy to the decedent.[2] *Illinois Central Railroad Co. v. Sanders,* 90 So.2d 366 (Miss. 1956). The Mississippi Supreme Court had previously held[3] that in computing damages under the wrongful death statute livinging expenses of the decedent were a necessarily deductible item. In the instant case it has held that they are not. It has taken this current position without troubling to overrule the previous cases. Whether the new law is better or worse than the old law is not in issue here, but the advisability of simply ignoring the previous cases instead of overruling them admits of some discussion.

Mississippi's wrongful death statute reads in part: "In such action the party or parties suing shall recover such damages as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent *and* all damages of every kind to any and all the parties interested in the suit." (Emphasis added). The Court's interpretation of this part of the statute and its many splendored approach to the questions involved thereunder have over the years made for an often uneven and unpredictable course. Present value of the life expectancy of a decedent as a recoverable element of damages seems to have been first recognized in Mississippi in 1906.[4] The Court reaffirmed its position in

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Civ. Code Ann. Art. 2315 (Dart, Supp. 1953); Me. Rev. Stat. c. 165, § 9 (1954); Md. Ann. Code Gen. Laws Art. 67, § 1 (1951); Mass. Ann. Laws c. 229, §§ 1, 2, 2A, 2B, 2C (Supp. 1953); Mich. Comp. Laws § 691.581 (1948); Minn. Stat. Ann. § 573.02 (1946); Vernon's Ann. Mo. Stats. § 537.080 (1951); Mont. Rev. Codes Ann. § 93-2810 (1947); Reissue Neb. Rev. Stat. § 30-809 (1943); Nev. Comp. Laws § 9194 (1929); N. H. Rev. Laws c. 355 § 9 (1942); N. J. Stats. Ann. § 2A:31-1-6 (1954); N.M. Stat. Ann. § 22-20-1 (1953); McKinney's Consolidated Laws of N.Y. N.Y. Decendent Estate Law § 130 (1949); N.C. Gen. Stat. § 28-173 (Supp. 1953); N.D. Rev. Code § 32-2101 (1943); Page's Ohio Rev. Code Ann. § 2125.01 (1953); Okla. Stat. tit. 12, § 1053 (1951); Ore. Rev. Stat. § 30.020 (1953); Purdon's Pa. Stat. Ann. tit. 12, § 1601 (1953); R.I. Gen. Laws c. 477, § 1 (1938); S.C. Code § 10-1951 (1952); S.D. Code § 37.2201 (Supp. 1952); Tenn. Code Ann. § 20-601 (1956); Tex. Rev. Civ. Stat. Ann. Art. 4671 (1936); Utah Code Ann. § 78-11-7 (1953); Vt. Rev. Stat. § 2926 (1947); Va. Code § 8-633 (1950); Wash. Rev. Code § 4.20.010 (1951); W. Va. Code Ann. § 5474 (1955); Wis. Stat. § 331.03 (1951); Wyo. Comp. Stat. Ann. § 3-403 (Supp. 1949).

[2]The only question the court was obliged to determine was (1). Plaintiff was entitled not only to some damages based upon decedent's life expectancy but also to damages for loss of companionship, protection, and society. Since damages based upon these latter three elements admit of a certain elasticity and are peculiarly for the determination of the jury, and since the size of the verdict was such that these elements could have accounted for a substantial portion of it, the Court was not squarely faced with the deductibility question.

[3]New Deemer Mfg. Co. v. Alexander, 122 Miss. 859, 85 So. 104 (1920), Hines v. Green, 125 Miss. 476, 87 So. 649 (1921), Louisville & Nashville R.R. Co. v. Garnett, 129 Miss. 795, 93 So. 241 (1922).

[4]Cumberland Telephone & Telegraph Co. v. Anderson, 89 Miss. 732, 41 So. 263 (1906). This action was brought under Miss. Laws, 1898, ch. 65 which amended Miss. Code (1892) § 663. The pertinent portions of the statute then in force were substantially the same as they are today. While the case is chiefly notable for its oblique and improper endorsement of pyramided damages, it serves as a landmark wrongful death case. It views the present value of the life expectancy of the decedent as an element of damage to the *decedent.* Neither the propriety nor the necessity of deducting decedent's living expenses from allowable damages was presented for decision.

1909[5] and was apparently of the same mind ten years later.[6] The deductibility question[7] did not present itself until 1920[8] when an instruction which sought to pyramid damages "thus making the monetary value of his [decedent's] life not only what he would have earned *without diminution for his own support,* but also such additional amount as it would take to support his wife and children,"[9] was condemned. (Emphasis added). There is some respectable reasoning[10] to the effect that *Hines v. Green,*[11] decided in 1921, went off under an FELA[12] formula, but a careful examination of the Court's opinion[13] would see to indicate that the damages allowed below should have been computed under the state statute,[14] and accordingly diminished to the extent of decedent's living expenses. Certainly there can be no equivocation over the statement that "Under the state law the plaintiff will be entitled to recover the NET present cash value of the expectancy. . . ."[15] (Emphasis added). This position of the court on the deductibility question doubtless persisted for at least another year, for in 1922 in *Louisville & Nashville R.R. Co. v. Garnett,*[16] the court said, "This question [necessity of deducting decedent's living expenses] was considered and passed upon in New Deemer Mfg. Co. v. Alexander, 122 Miss. 859, 85 So. 104, and Hines v. Green, 125 Miss. 476, 87 So. 649. It was held in those cases that the present cash value of what one would earn during his life expectancy must be diminished to the extent of what he would have spent in his own maintenance and support had he lived."[17] It is submitted that this position could not have been altered by four rather curious opinions from 1924 through the early part of the March 1928 term holding that (1) in a suit seeking recovery for damages solely to the decedent the present value of the life expectancy to the decedent is not recoverable,[18] (2) where there are no statutory beneficiaries or creditors, the administrator can recover nothing, not even decedent's funeral expenses,[19] (3) an instruction for the plaintiff couched almost verbatim in the language of the statute was error, since conceivably the present value of the life expectancy could have been awarded by the jury.[20] and (4) the present value of decedent's life expectancy was damage

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[5]Mississippi Oil Co. v. Smith, 95 Miss. 528, 48 So. 735 (1909). There was no claim for damages for the present value of the life expectancy of the decedent; hence, deductibility of living expenses was not in issue.

[6]Gulf & S. I. R. R. v. Boone, 120 Miss. 632, 82 So. 335 (1919).

[7]I.e., granted the present value of the life expectancy of the decedent is an element of damage, must the living expenses of the decedent for his life expectancy be deducted from the damages awarded?

[8]New Deemer Mfg. Co. v. Alexander, 122 Miss. 859, 85 So. 104 (1920).

[9]Id. 122 Miss. at 896, 85 So. at 107.

[10]See brief of Henley, Jones & Woodliff for appellee in the Supreme Court of Mississippi. No. 40, 266 at page 114.

[11]125 Miss. 476, 87 So. 649 (1921).

[12]Stat. 45 U.S.C. §§ 51-59 (1952).

[13]See 125 Miss. at 497, 87 So. at 652: "[T] he facts do not bring the case within the federal Employers' Liability Act. . . ."

[14]See 125 Miss. at 498, 87 So. at 653.

[15]See 125 Miss. at 495, 87 So. at 652.

[16]129 Miss. 759, 806, 93. So. 241, 243 (1922).

[17]The reference in this language to *Hines v. Green* would seem rather finally to dispel the idea that that case went off under the FELA. See note 10, supra.

[18]Belzoni Hardwood Co. v. Cinquimani, 137 Miss. 72, 95, 102 So. 470, 474 (1924).

[19]Yazoo & M. V. R. R. v. Barringer, 138 Miss. 296, 103 So. 86 (1925).

[20]Yazoo & M. V. R. R. v. Lee, 148 Miss. 809, 822, 823, 114 So. 866, 869 (1927).

neither to the decedent nor to statutory beneficiaries.[21] These cases shed no light on the deductibility question. Each in its own way held that decedent's life expectancy was out of the picture. During the four year hiatus, then, the deductibility issue was perforce moot.

One writer[22] has concluded that between 1924[23] and 1949[24] "counsel for plaintiffs avoided life expectancy like the plague. . . ." If it is true that counsel were loath to speak of expectancy in this 25 year period, the justices were less timorous. By the latter part of the March 1928 term[25] the Court was leaning back to its earlier position that ". . . . the present *net* cash value of his [decedent's] life expectancy measured by his earning capacity"[26] was a proper element of damages. (Emphasis added). Worthy of note is the fact that at the same time the court was revitalizing the life expectancy doctrine it was reviving the word *net* in connection therewith. This invites the conclusion that the proper method of computing the value of a decedent's life expectancy in the latter part of the 1928 term was precisely what it had been when the *New Deemer, Hines,* and *Garnett* cases were decided.

In 1931 the Court[27] examined an instruction that the "jury might take into consideration the present value of the life expectancy of the decedent. . . ."[28] It held the instruction erroneous in that it would warrant the jury in concluding that the statutory beneficiaries were entitled to recover "the *full* present value of his [decedent's] life expectancy."[29] (Emphasis added). While it is not implicit in the opinion that had the instruction sought *net* present value instead of *full* present value it would have met with any less disfavor, it is clear that if *any* sort of present value was to be allowed, it was *net*. By 1949[30] the Court seems to have swung back to its 1906[31] position, and the *Cumberland Telephone* case apparently emerges as good law except insofar as it permits pyramiding of damages; also the Court cited the *New Deemer*[32] case with approval.[33] Since the *Cumberland Telephone* case squarely held that the present value of the life expectancy of a decedent is recoverable and since the *New Deemer* case held that living expenses of a decedent must be deducted from the damages awarded, it follows that as late as 1949

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[21]Gulf Refining Co. v. Miller, 150 Miss. 68, 116 So. 295 (1928). This curious conclusion was reached without overruling, or distinguishing — indeed, without mentioning — *Cumberland Telephone & Telegraph Co. v. Anderson,* 89 Miss. 732, 41 So. 263 (1906). It is, therefore, perhaps only passing strange that the present Court took the position it did in the instant case without so much as a passing nod at the cases cited in note 3 supra. At least there seems to be precedent for such a maneuver.

[22]Ross, "Damages For Personal Injury and Wrongful Death", 27 Miss. L. J. 92 (1956).

[23]Belzoni Hardwood Co. v. Cinquimani, 137 Miss. 72, 102 So. 470 (1924).

[24]Gordon v. Lee, 208 Miss. 21, 43 So.2d. 665 (1949).

[25]G. M. & N. R. R. v. Graham, 153 Miss. 72, 117 So. 881 (1928).

[26]Id. at 153 Miss. 80, 117 So. 884.

[27]Natchez Coca-Cola Bottling Co. v. Watson, 160 Miss. 173, 133 So. 677 (1931).

[28]Id. at 160 Miss. 181, 133 So. 679.

[29]Ibid.

[30]Gordon v. Lee, 208 Miss. 21, 43 So.2d. 665 (1949).

[31]Cumberland Telephone & Telegraph Co. v. Anderson, 89 Miss. 732, 41 So. 263 (1906).

[32]New Deemer Mfg. Co. v. Alexander, 122 Miss. 859, 85 So. 104 (1920).

[33]Gordon v. Lee, 208 Miss. 21, 34, 43 So.2d. 665, 667 (1949).

Hines v. Green[34] and *Louisville & Nashville R. R. Co. v. Garnett*[35] as well as *New Deemer* were still good law. No language inconsistent with this conclusion is present in the 1950 case, *Bush v. Watkins*,[36] wherein the plaintiff sought and was allowed "the present *net* case value of the life of the deceased. . . ."[37] Eight of the justices in the *Bush* case were of the opinion that the question in issue here had been settled prior to 1950. Perhaps it had. If so, it was unsettled again in 1956 in the instant case.

If it is permissible "profitably to refer to the point whence we departed in the hope of being able to conjecture where we are now"[38] it may be well to reiterate that the wisdom vel non of the present Court's position on the deductibility question is not in issue. The technique of arriving at that position is open to criticism. To paraphrase the late Mr. Justice Jackson,[39] if there is one thing the people are entitled to expect from their lawmakers, it is a rule that will enable individuals suing or defending under the wrongful death act to know whether or not the living expenses of a decedent must be deducted from the decedent's life expectancy. As of now the issue seems far from settled.

Scott Tennyson

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[34]125 Miss. 476, 87 So. 649 (1921).
[35]129 Miss. 795, 93 So. 241 (1922).
[36]80 So.2d. 19 (Miss. 1955).
[37]Id at 21.
[38]Attributed to Daniel Webster.
[39]Dissenting in Estin v. Estin, 334 U. S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561, 1 ALR 2d. 1412 (1948).

RECENT BOOKS

CONTRACTS, SPECIFICATIONS AND ENGINEERING RELATIONS. By Daniel W. Mead. Rewritten by the Staff of Mead and Hunt, Inc., Consulting Engineers, Madison, Wisconsin, and Joseph Reid Akerman, Associate Professor of Mechanical Engineering, University of Wisconsin. McGraw- Hill Book Company, Inc. 1956. Pp. 427. $7.00.

The successful practice of law requires wide acquaintance with human nature and the forces and considerations which produce individual action. The best way for a lawyer to protect the interest of his client engaged in some aspect of construction or its effects, whether the need be for the drafting or approval of a contract, specifications, general conditions, or notice to bidders or for the representation of litigants, is for the lawyer to understand and be familiar with the engineer's point of view.

The book under review offers an understandable and authoritative introduction to the engineering profession and to the factors governing the engineer's professional conduct; for though its basic purpose is to set forth the important relations which the beginning *architect* or *engineer* should know about, it contains an accurate discussion of so many matters as to not only widen the lawyer's knowledge and understanding of a technical profession and its personnel, but also to ably point out the important legal consequences and hazards attendant upon engineering and construction work.[1]

The first eight chapters of the book, dealing thoroughly but concisely with their separate title and general subject of engineering relations, are: The Engineer and His Education; Success in the Engineering Profession; The Engineer at Work; Personal and Ethical Relations; The Use of English; Letters and Reports; Origin, Nature, and Development of Law; and Legal Relations, Rights, and Responsibilities of Technical Men.

Throughout the entire book runs the spirit expressed in the first chapter to the effect that fiduciary relations established as the engineer attains high professional character require not only conscientious and energetic effort toward personal professional advancement but also the discharge of obligations toward the profession and humanity even to the sacrifice of personal interest; and engineers are effectively reminded that their calling involves a high conception of personal honor and obligation toward not only their clients, but also their profession, the

[1]"Few lawyers in ordinary practice, however, possess the knowledge of engineering contracts or of the conditions of construction that is necessary in order to draw a satisfactory contract for construction work. Engineering contracts, as well as technical specifications, should be prepared by the engineer and submitted to the attorney to see that the legal requirements are properly covered. . . . In each branch of engineering there are certain legal relations, the knowledge of which is indispensable to successful engineering practice. There are so many laws that no lawyer in general practice can be thoroughly informed on all legal matters and the engineer in practice frequently becomes better informed on those laws which affect his own specialty than does the lawyer in general practice. On important matters, expert legal assistance should be employed, as specialists in the law are as essential for a proper knowledge of special legal requirements as are specialists for the best practice in engineering." Mead, Mead and Akerman, *Contracts, Specifications and Engineering Relations,* pages 11 and 12 (Third Edition 1956).

state, the nation and humanity in general.

Chapters 15 through 19, dealing with specifications and designs, are, of course, principally for engineers and architects, but their messages are of great and easily understood importance to both the lawyer and engineer. Witness their titles: Preparation of Specifications; Technical Specifications; Technical Specifications: Materials and Processes; Technical Specifications: Machinery, and Designs; and Specifications for Engineering and Architectural Work.

A complete appendix comprised of a sample contract and specifications, together with a list of standardizing organizations concludes this third edition of an interesting analysis of an engineer's varied relations and functions and the contracts and specifications which express his creative potential, an edition rewritten by an outstanding firm of consulting engineers, with the assistance of obviously able, legal and technical editors.

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FEDERAL ESTATE AND GIFT TAXES. By Charles L. B. Lowndes, and Robert Kramer, Professors of Law, Duke University. Prentice-Hall, Inc. 1956. 971 pages.

The preface states "The purpose of this book is threefold. To the experienced practitioner, we have attempted to present a compact text to refresh his recollection. To the general practitioner, who is not a tax specialist, we have tried to offer a convenient means of familiarizing himself with the tax considerations he must have in mind properly to plan an estate, draft a will or a trust, or act as attorney for an estate. To the student beginning his studies, we have sought to supply an introduction to the basic principles of the federal estate and gift taxes and of tax planning for estates."

Certainly these are worthwhile objectives. Their attainment is somewhat difficult in any field of law and unusually so in such a field as tax law. If the work is simple and concise enough for the student, unresolved or latent ambiguities may plague the general practitioner, while the specialist complains that the work scarcely touches the most important aspects of the matter. If technical to the needs of the specialist, the general practitioner may complain of excessive refinement obscuring the important points while the student may well be lost in a maze of detail.

Can a single book accomplish such broad objectives and yet pass the tests implied? Is the information accessible? Is it easily understood? Does it offer comprehensive coverage?

Starting with accessibility of information, we find that an unusually detailed table of contents outlines in very helpful fashion the topics of inquiry. It takes in logical sequence the nature of a death tax (including both Inheritance and Estate Taxes), the historical developments and constitutionality of the federal estate tax, and the principal concepts, gross estate, deductions, credits, net estate.

With Chapter 4 begins a detailed analysis of the many property interests that have been found to be within the meaning of the board statutory provision subjecting to the tax "the value of all property (except real property situated outside of the United States) to the extent of any interest therein of the decedent at the time of his death." To the usual problems surrounding property interests are added the complexities of interplay of state property laws and federal laws of taxation. An example is the change in the federal tax laws creating the "marital deduction" to equalize the burden to some extent between residents of community property states and those of other states.

In succeeding chapters are considered those interests which were created as substitutes for testamentary dispositions and are therefore brought within the taxable estate.

Chapter 5 delves into the Intricacies of transfers in contemplation of death and the presumption that leads to the inclusion of the value of such property in the gross estate of the decedent. Section headings deal with the tests that are used to confirm or rebut the presumption, including one intriguing heading entitled "Erroneous Contemplation of Death." Still another, Section 13 points out the "Advantages of Gifts in Contemplation of Death."

"Transfers Taking Effect at Death" and "Transfers with a Reservation of a Life Interest" are dealt with in sufficient detail in Chapters 6, 7, and 8 to provide a helpful guide to application of the complex rules concerning taxability where there is retention of reversionary interests, or income rights, or use, or powers of appointment over property ostensibly transferred to others prior to death. Modern applications of these rules to such ordinary devices as "Funded Insurance Trusts", "Gifts of Stock in Family Corporations" and to the variations of annuity and life insurance contracts, are likely to provide answers to daily problems in any law office.

In dealing with the elements of the gross estate arising under joint tenancy and tenancy by the entirety, the book includes coverage of such everyday problems as the "Taxation of Joint Bank Accounts and U. S. Bonds Registered in the Names of Co-Owners."

The many types of powers of appointment, including powers that have pre-existed or followed the various legislative changes and powers of such varying types as general, special, contingent, joint and discretionary, and the effects of renunciation of these powers are given considerationwhich should greatly assist any attorney in gaining an understanding of the complex property interests. Some modern applications of these rules are given, such as where an employee under a benefit plan has retained the power to change his beneficiary until his death. Chapter 12 deals with similar questions concerning the taxation of life insurance.

Beginning with Chapter 14 the "Exemption, Expenses, Indebtedness and Taxes and Losses" that are deductible from the value of the gross estate are considered one by one. In Chapter 14, Section 9 appears a comment that may be of interest to many lawyers: "Attonery's fees incurred in contesting a tax deficiency asserted against the estate, or prosecuting a claim for a refund are deductible. . . . If no claim is made for attorney's fees for contesting the tax until after final judgment is entered, there is a

split of authority as to whether or no the deduction may be claimed later."

The always fascinating "Marital Deduction" with rules concerning "terminable interests" and exceptions are included in Chapters 16, 17 and 18, together with a noteworthy explanation and example of the disclaimer rule.

The subtle and deceptive distinctions between a "disclaimer" of a bequest which might qualify for the marital deduction, or in the alternative a "renunciation" of a power of appointment over the same property, and a "release" of a general power of appointment, together with the accompanying opposite tax results are made easier to understand with the explanation on pages 264 and 385.

"Valuation" is possibly the most controversial point in the entire field of death taxation. Once the elements of "all property" owned by the decedent at death are determined, the serious business of determining the "fair market value" of such interests is encountered. An option is givn by statute of taking the fair market value at the date of death or one year later. In the interim significant changes in value may occur. Thus, the time, place, and method of valuation, together with evidence of value in such situations are examined. For example: the effect of the death of an important member of a partnership upon the value of the partnership interest might be very much greater a year after his death. Particularly difficult questions of valuation arise where life estates, remainders and reversions are subject to contingencies, such as discretionary powers in a trustee, and where the value of the estate would be diminished by any charitable contingent remainder. Chapter 20 appears to offer many helpful guides in answering these problems.

About two hundred pages are given to explanation of the gift tax and its relations to the Estate Tax and to the application of the exemption ($30,000.00) and the annual exclusion ($3,000.00 per beneficiary) to specific cases.

Part III deals with tax planning for estates and is perhaps the most valuable portion of the book for most lawyers. After the usual caution that "Tax Plans Must Not be Permitted to Distort Estate Plans", Part III proceeds to give a very understandable summary of many of the problems encountered in the tax planning of an estate. Chapter 2 of this Part deals with "The Mathematics of Inter Vivos Transfers" and considers the Income, Estate and Gift Tax aspects of gifts during the life of the property owner.

Chapter 8 of Part III is particularly important. It is entitled "Income Tax Considerations in Connection with Tax Planning for Estates." It states in part "unless a man takes steps to control his income tax, he is unlikely to accumulate any estate to plan."

Does this book accomplish its objectives? Your writer believes that it does. While it would be possible to expand most of the chapters into near book length without exhausting the subjects, the digested information appears to offer unusually understandable explanations of the more complex problems. It contains adequate references to other authorities for more specific information, thus gaining comprehensiveness of coverage without undue complexity.

The book does have a pocket space and presumably will be kept up to date.

In your writer's opinion, this book would be a valuable asset to any lawyer having an interest in estates, trusts and taxes.

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FREEDOM IN CONTEMPORARY SOCIETY. By Samuel Eliot Morison. Boston: Atlantic — Little, Brown, 1956. Pp. 156. $3:50

In this short work, originally delivered as a lecture series at Queen's University (Ontario), Admiral Morison briefly summarizes the development and present status, with particular emphasis on the United States, of three aspects of freedom -- political, economic, and academic. Religious freedom is not discussed, the author feeling that, though vital, it is "relatively secure in Western countries."

Discussion of political freedom, which Morison considers the basis of all freedoms, brings up the inevitable dilemma whether the safeguards of liberty should protect those who would destroy liberty. This issue, though quiescent at the moment, has never been effectively resolved; it is treated usually in the heat of panic or the chill of utter ignorance. In seeking a temperate zone between these extremes, Morison proposes firstly, legal recognition of local communist parties, if, over a period of time, they can prove themselves independent of the Moscow line; and secondly, curbing by legal safeguards the current plethora of quasi-judicial administrative bodies. That these are steps in the right direction is probably true; that they constitute a solution, however, is doubtful. The difficulty is, of course, that formulae, including the Golden Rule, have never successfully resolved problems of human relations and interaction. Allowance must be made for the brevity of the work, which does not admit of comprehensive treatment.

In his discussion of economic freedom, Admiral Morison sets up as his straw man the defunct doctrine of liassez faire and demolishes it, together with its latter-day prophets (Jewkes, Hayek, and Schumpeter), summarily and with obvious enjoyment. On the whole, he regards the present "mixed system of semicontrolled free enterprise" as reasonably satisfactory, with sufficient elements of stability and flexibility for the long pull.

The principal threat to academic freedom the author finds in the "professional pedagogue" (product of an education in education) and in the lowered standards of the universities. He recommends restoration of these standards, avoidance of intellectual arrogance by scholars, and an earnest effort to attract to the teaching profession the "best brains and the boldest spirits." The menace of communists within the schools, and of their overzealous seekers without, he regards as serious but not critical.

The university, indeed, is properly the incubator and testing-ground of ideas, both orthodox and heritical, and nothing, except that which is

purely trivial, should be denied access on grounds of controversiality. If communism, or any other idea, is a menace, it cannot be combatted adequately by one who does not understand its appeal. The large majority graduating from today's college and law school has hardly heard of dialectical materialism; much less can define it or account for the fact that half the world's population is governed, at least nominally, by the tenets of this philosophy. Is such a graduate capable of forming and holding a valid opinion, pro or con, regarding perhaps the major question of our days?

The book is a concise and readable, if far from definitive, survey of problems of the present and recent past. This reviewer found an excessive reliance on argument from the special case, but this is doubtless an evil inherent in any brief sketch of vast issues. The work has no greater pretensions.

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MODERN TRIALS. By Melvin M. Belli. Indianapolis: The Bobbs-Merrill Company, Inc. 1954. Pp. 2763. $60.00

In his scholarly introduction to this work, Dean Roscoe Pound says: "Here is an indispensable book for the trial lawyer in personal injury cases. Indeed, it will have much which will give the trial lawyer in general practice food for thought."

The title is a bit misleading. While the book contains much that will be of interest and value to any trial lawyer, it is written almost entirely from the point of view of the plaintiff's lawyer in a personal injury action seeking the "adequate award."

Mr. Belli is so universally recognized as one of the country's most outstanding plaintiff's lawyers that he has been given the sobriquet "King of Torts." This book is ample evidence that his acclaim is justly deserved and that his success perhaps is due to a rare combination of originality, brilliance and thorough, painstaking preparation.

In this three volume work he undertakes, and with marked success, to point the way to thorough preparation and convincing presentation, both in settlement and in trial, of the plainiff's case in a tort action. This book is different from most law books. It is not a treatise on the substantive law of torts, although one does not read very far before realizing that the author could well write such a book. It is a very pratical book on how to handle the client's tort case from the minute that the client comes into the office, through investigation, negotiations for settlement, trial, appeal and final disbursement of the funds. As befits the profession's leading exponent of "demonstrative evidence," the author illustrates and demonstrates his points with a generous assortment of photographs, office forms, medical reports, sample pleadings and other material taken from the files of actual cases tried by the author's firm or by other outstanding personal injury lawyers.

By way of organization the author divides his material into chapters of varying length, and this reviewer will briefly summarize by chapters the material covered.

CHAPTER 1 — *General Considerations.*

In this chapter the author introduces the reader to the style and nature of the book and says that its theme and purpose is "demonstrative evidence." He discusses the attorney-client relationship, especially as it relates to the plaintiff's lawyer, and the contingent fee contract. Citing the fact that 75% of all cases tried today involve personal injury, the author maintains that the contingent fee contract is the only means whereby the injured plaintiff without substantial funds may hope to achieve an "adequate award." [In the words of Dean Pound, "The contingent fee system seems to be the only workable solution for the protection of the mass of injured persons in the United States of oday."] In this introductory chapter, the author also exhibits his flair for the original and unusual by illustrating with pictures how he solved the problem of getting a 685 lb. plaintiff on a hospital bed into court by employing a crane to swing the man and his bed up and through a window into the courtroom where the jury was waiting.

CHAPTER 2 — *Investigating the Case.*

One does not read far into this chapter before realizing that Mr. Belli would be the first to agree with the adage that "genius is 90% hard work." He points out many aids in this chapter and the next to assist the tort lawyer in making that meticulous and exhaustive investigation which is the foundation of any well-constructed lawsuit. [This chapter is short, but it is well illustrated and contains many practical suggestions as to how the true facts surrounding any occurrence may be determined.]

CHAPTER 3 — *Have I a Case?*

In the opening sentence of this chapter the author says that it is not intended to be encyclopedic either in evidentiary, procedural or substantive law. However, it is a long chapter and in it the author discusses, with liberal footnotes, such substantive tort theories and appropriate remedies as the rescue doctrines; the last clear chance; wanton or wilful conduct; assumption of risk; liability without fault; res ipsa loquitur; the immunities; federal tort claims act; family torts and immunities; prenatal injuries; emotional disturbances; contribution between joint tort-feasors; landlord's liability; dram shop acts; riot damage; workmen's compensation; suing the insuror; setting aside releases; comparative and contributory negligence; expert testimony and opinion; maritime law applicable to personal injuries; airplane law applicable to death, property damage and personal injury; nuisances; and an article on defamation prepared by J. Peter Tonkoff and Charles Olson of the Washington State Bar. This chapter will be of great value to the plaintiff's lawyer trying to work out the best theory of a case based on novel or unusual facts. [The organization of this chapter leaves something to be desired. Mr. Belli recently stated publicly that the index to the book is inadequate, and that is especially true of this chapter. Nevertheless, this chapter with its citation to authorities will be a valuable reference for any busy trial lawyer in the preparation of his cases.]

CHAPTER 4 — *Pleading the Case.*

This is the chapter in which the author sets forth a few examples of

pleading under the California practice. Although much of this is not applicable to our Mississippi practice, it will be of interest and of some help to even an experienced pleader.

CHAPTER 5 — *The Medical Examination; Diagnosis and Prognosis; Exemplar Reports.*

This chapter includes a discussion of several of the most common pathological conditions likely to be encountered by the personal injury lawyer, and with which he should be, or must become, familiar. The author uses with great effect numerous full and complete medical reports relating to various physical injuries. These will aid the general practitioner, who is not too thoroughly versed in medical terminology and the problems related to introduction of medical evidence, in obtaining full medical reports and becoming familiar with the facts and terminology surrounding his client's particular injury.

CHAPTER 6 — *Settling from Different Viewpoint: the Brochure.*

The author helped initiate "the brochure" method of settlement, and is a most ardent advocate of its use as one of the "procedures of full disclosure." He explains and illustrates with examples of actual cases his method of preparing the brochure and using it in preparing, settling, trying or appealing a case.

CHAPTER 7 — *The Jury.*

It is entirely apparent that Mr. Belli has had a great deal of experience with many different types of jurors. All lawyers will enjoy this chapter and most will benefit from it, although it deals more with the jury in a large city than the typical jury of a small Mississippi community.

CHAPTER 8 — *Trial by Blackboard.*

It is this feature of Mr. Belli's trial technique which perhaps has evoked the most comment among lawyers. He includes a brief discussion of the use of the blackboard in Mississippi, with citations to Mississippi cases which were still on appeal at the time the book was written. [His explanation of the use of the blackboard will, in this reviewer's opinion, be extremely valuable to any trial lawyer who has not yet himself used a blackboard in the trial of a case.]

CHAPTER 9 — *Demonstrative Evidence-Civic Cases.*

CHAPTER 10 — *Experiments.*

CHAPTER 11 — *Models.*

CHAPTER 12 — *Pictures.*

CHAPTER 13 — *Exhibition of Person-Examination in and out of Court.*

CHAPTER 14 — *Medical Demonstrative Evidence.*

These chapters, all of which deal with "demonstrative evidence", comprise more than half of Volume 2. Mr. Belli gives hundreds of examples of how to use effectively models, pictures, experiments, real evidence and other demonstrative evidence to convey to the minds of the jury the facts of the accident and of the injury. The theory of demonstrative evidence is, of course, as old as the law itself. Truly, "a picture is better than a thousand words." Sometimes a model is better than a picture, and an experiment is often even better. [The Mississippi lawyer will find in these chapters many uses of demonstrative evidence which he can apply to his client's particular case to show a jury—as opposed to telling a jury—what happened.]

CHAPTER 15 — *Witness Examination.*

Recognizing that the art of examination is not an exact science and that "every artist must play his own tune" the author still points out that there are certain available procedures and recognized techniques as well as dangers to be avoided. He discusses these very ably and in a manner which will be helpful to all but the most experienced trial lawyers.

CHAPTER 16 — *"Pain and Suffering" and Dollars and Cents.*

In view of the recent trend, especially in Mississippi, to allow substantial damages for pain and suffering, this chapter will be of particular interest to Mississippi lawyers. [The lawyer whose case must rest largely on this element of damages will find it, and the authorities cited, of great value.]

CHAPTER 17 — *Argument.*

Mr. Belli believes that the argument is one of the most important parts of the lawsuit, that it should be factual, not florid, and that a good argument is best attained by hard work, determination and sincerity. [His discussion and illustrations make interesting reading and contain much that will be of value to the reader.]

CHAPTER 18 — *Jury Instructions.*

Although the Mississippi lawyer will want to check carefully the substantive laws of Mississippi before using them verbatim, the example of jury instructions in tort cases should be helpful in drawing a set of instructions for a Mississippi jury.

CHAPTER 19 — *Demonstrative Evidence on Appeal.*

Mr. Belli recognizes that demonstrative evidence is not widely used on appeal but thinks that it should and will be more widely used in the future. [This chapter will assist trial lawyers in making sure that the record reflects as clearly as possible what demonstrative evidence was used in the trial of the case.] In the opinion of this reviewer, it is doubtful if the extensive use of the pictures, diagrams and other demonstrative evidence in briefs and the use of pictures, diagrams and models in oral argument would comply with the present rules and accepted procedure of our Supreme Court.

CHAPTER 20 — *Medical Malpractice.*

Recognizing that doctors as a practical matter are almost immune from a malpractice suit, the author nevertheless gives a very able discussion of the legal and practical aspects of such a suit. This chapter is based on experience gained in successful suits and is well annotated with citations to cases involving malpractice and textbook authorities. [For the lawyer who finds himself representing either the plaintiff or defendant in such an action, this chapter should be of immense value.]

CHAPTER 21 — *Demonstrative Investigations and Evidence in the Criminal Law.*

Mr. Belli says: "This separate chapter on criminal demonstrative evidence is intended to point out to the lawyer specializing in civil cases the many scientific procedures employed in criminal investigation and trial that he, too, may use in the proof of fact." It contains many examples of modern scientific methods of investigation available to police officers and shows how scientific facts may be demonstrated to the jury.

[In addition to serving the primary purpose for which intended, this chapter will also be of value to the lawyer engaged in the trial of criminal cases.]

CHAPTER 22 – *"The Most Adequate Award."*

Mr. Belli's major thesis is that a *fair* award for a person who has suffered painful and permanent personal injury as a result of negligence is of necessity a *large* award. The trend to "adequacy" in awards, both by juries and by settlement, he maintains is long overdue. Rather than such awards being excessive, he argues convincingly that the smaller awards of a generation ago were unconscionable. He lists numerous examples of large amounts awarded plaintiffs by injuries and large amounts recovered by way of settlement, with a brief summary of the essential facts of each case. This information should be of value to the Mississippi lawyer, not only in properly evaluating his client's damages, but in convincing insurance adjusters and opposing counsel of the value. [The largest award of which Mr. Belli had knowledge in 1954 was $420,000.00 awarded by a jury to a 43-year old painter who lost both legs at the hips, his left arm below the elbow and most of his right hand when run over by a box-car. He classifies and lists awards by trial and by settlement, as well as by injury and by states.] At the time of publication the largest award in Mississippi was $125,000.00. Also listed is one for $85,000.00, one for $50,000.00 in 1907 and one for $30,000.00. There have been additional substantial awards in Mississippi since the publication of this work, and it appears that Mississippi can no longer be classified categorically as a state of low recovery.

CHAPTER 23 – *Medical Glossary.*

This is a handy glossary which will assist the lawyer in determining the meaning of medical terms and a little of their derivations and connotations. It is not exhaustive, but it will be of help in reading, analyzing and converting to lay language the typical medical report.

CHAPTER 24 – *Bibliography, Medical, Legal, General References and Literary Works.*

This chapter contains a brief definition of most commonly used medical terms and a fairly complete bibliography of medical and legal works as well as the author's bibliography. The bibliography should point the way to any further and more specialized reading which may be desired in any related field.

In this reviewer's opinion, this book is one which literally will pay for itself many times over in increased awards and consequently increased fees. For the Mississippi lawyer who represents either the plaintiff or the defendant in personal injury cases, whether frequently or seldom, this book is highly recommended.

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PARTNERS AND PARTNERSHIPS – LAW AND TAXATION. By J. M. Barrett and Erwin Seago. Charlottesville, Virginia: The Michie Company, Law Publishers, 1956. Pp. 1680 (two volumes).

Messrs. Barrett and Seago have produced a work on the general law of partnerships and on the federal taxation of partnerships that fills an important gap in the modern law library. The 1954 revision of the Internal Revenue Code made substantial changes in the method of taxing partnerships and there was a need for a text book analysis and explanation of the new provisions, some of which departed drastically from the previous principles of partnership taxation.

No major new work on partnerships has appeared for many years, during which time most (thirty-one) of the states have adopted The Uniform Partnership Act (Mississippi has not). A thorough analysis of The Uniform Partnership Act is set forth, and the advantages of having such an act in all the states is made clear by a concise discussion of the different and inconsistent treatment within the various states of identical aspects of partnership law. The Uniform Act has done much to eliminate this problem, and to produce harmony in the development of partnership case law among the various states.

From a brief historical background of the development of partnerships in Roman Law, The Law of Merchants in the Middle Ages, and the Common Law of later years, the authors proceed to a thorough analysis of the law of partnerships in all their various forms in use in the United States today. The "Family Partnership" as a creature of taxation receives special treatment, and should be of interest to all who deal with this problem. The property of a partnership holds a special position in our law and this phase is discussed from the transfer of the property to the partnership to the disposition of property on the death of a partner, or the dissolution of the partnership.

The formation of a partnership, and the powers, rights and obligations of partners are fully discussed and augmented with a comprehensive selection of case law from all the states.

The authors deal with the two traditional theories concerning partnerships, i.e., The Entity Theory vs. The Aggregate Theory. The Entity Theory is the concept commonly held by the business community, accountants , and laymen, and considers that the partnership, as such, has rights and obligations distinct from the members of the partnership. The Aggregate Theory or the common law concept of partnerships "knows nothing of the firm as a body or artificial person distinct from the members composing it." Both the English Partnership Act, and the American Uniform Partnership Act use the aggregate theory of partnership law. Nebraska is one of the few states to use the entity theory of partnerships.

The theory of joint and several liability of each partner, which is a major problem in the use of the partnership form of business, is dealt with, as it should be, throughout the two volumes.

Business and tax planning for the partnership is discussed extensively. The "Buy and Sell" agreement, valuation of partnership interests, and estate tax considerations, together with the various uses of insurance

by the partnership are well treated. These aspects are of real importance in partnerships today. The use of life insurance in connection with the buy and sell agreement in partnerships has gained wide popularity. The Entity Plan and the Cross Purchase Plan for insurance are commonly used for the purchase of partnership interest on the death of one of the partners.

Where a partnership grows more complex with the years, consideration should be given to the advantages of incorporating. One chief consideration is the federal income tax status of the partners and the result tax-wise of incorporating. The many facets of this problem are discussed and helpful suggestions are offered to aid in the decision of which form of business is best under many differing circumstances. Usually realization of taxable gain or loss can be avoided in the transfer from the partnership form to the corporate form.

The basis of partnership assets in the hands of the partners and in the hands of a corporation are problems rendered more complicated by the 1954 Internal Revenue Code, and the authors have done much to simplify an understanding of this problem.

The limited partnership occupies a small but confusing position in our law, and the tax consequences are still uncertain, but a basic analysis of this form is set forth and the problems inherent in its use are discussed.

In all Messrs. Barrett and Seago have undertaken a large task and have supplied the law student and the practicing lawyer with a well annotated work on the law and taxation of partnership which will be valuable both as a quick reference and as a good background understanding on this subject.

Joe Jack Hurst
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Jackson, Mississippi

PROFESSIONAL ETHICS OF CERTIFIED PUBLIC ACCOUNTANTS. By John L. Carey. Published by the American Institute of Accountants, 1956. Pp. 233. $4.00.

This book is a completely revised edition of Mr. Carey's study of the profession's ethics that appeared originally in 1946.

In his prefacing statements Mr. Carey wrote that, although in the ten years since his first book the number of C.P.A.s has increased from 28,000 to 54,000, "the stature of the profession has increased more than its size." Because of this and because of the public, which relies upon the opinions and advice of "the conscience of the business world", is becoming curious about the code of ethics which governs certified public accountants, Mr. Carey made this comprehensive study.

The book is divided into three parts, the first of which relates to the general principles of ethics. Currently, the most important part of that section is chapter three, which deals with independence.

"Independence, in the sense of being self-reliant, not subordinate, is essential to the practice of all professions. But independence has come

to be almost a 'term of art' when speaking of certified public accountants in conjunction with auditing and expressing opinions about financial statements."

Mr. Carey brings out the point that it is important that the C.P.A. not only refuse to subordinate his judgment to that of others, but that he be independent of any self-interest which might warp his judgment, even subconsciously, in reporting whether or not the financial position and net income are fairly presented. This means objectivity or lack of bias in forming delicate decisions.

This chapter discusses special points which are usually brought up in any controversy such as now prevails over the C.P.A.s many positions. They are all reasonably and well covered from both points of view.

In the coverage of "Independence Versus Advocacy", the author quotes Mr. Maurice H. Stans, then president of the American Institute of Accountants, who said that the accountant, like the lawyer, can properly perform one function without hindering his ethical performance of another. He can install systems, give advice on accounting and other financial matters, express opinions on financial matters, express opinions on financial statements and still be qualified to defend his client before the Treasury Department.

When he expresses an opinion on a financial statement — that it fairly presents the financial position of the business — he is guided by generally accepted accounting principles. Whereas in tax and other advocacy work he is well qualified because he is aware of the data shown by the records and the variations between book income and taxable income permitted or required by the tax law.

The Council of the American Institute of Accountants said, in part, in an official statement published in July of 1947, "Independence is an attitude of mind, much deeper than the surface display of visible standards. . . . Independence, both historically and philosophically, is the foundation of the public accounting profession and upon its maintenance depends the profession's strength and its stature."

In chapter four Mr. Carey says that the new form of society existing in the United States attempts to combine the creative forces of competition in business with safeguards against exploitation of one by another. He says this system is dependent upon the imposition of *accountability* upon business management — accountability to stockholders, creditors, governmental regulatory agencies and others with legitimate interests.

Part Two of the book is titled *Auditing, Tax Practice and Management Services* and is a more detailed and enlightening coverage of an accountant's many duties and responsibilities in the above-named fields of his profession that were referred to in chapter three of Part One.

Among many other interesting subjects discussed in Part Two, there were such things as: *Generally Accepted Accounting Standards; Ethical Problems In Tax Practice; Ethical Responsibilities Involved In Relations with the Legal Profession in Tax Practice;* and *Incompatible Occupations.*

Part Three of Mr. Carey's book, *Relations With Others*, comprehensively covers a great many fields of contact an accountant may have with others and the relationship that should exist in each case. As an example, the author cites the C.P.A. who has the confidence and respect of both

his client and the internal revenue agent as a stabilizing force in that field.

Chapter eight, in Part Three, deals with the accountant's *Relations With Clients.* The C.P.A., by very nature of his profession, is admitted to knowledge of his client's most private business. Often he is engaged by competitors in the same line of business, each of whom would be most interested in knowing about the affairs of the other. It would be fatal to the C.P.A.s career, and damaging to the whole profession, if information entrusted to him were improperly revealed.

Also covered in chapter eight are such interesting subjects as *Privileged Communications. When a C.P.A. May Make Disclosures Related to His Work, Fee Splitting, Competitive Billing,* and many others. This chapter would prove very enlightening to many attorneys. The similarity between the Rules and Ethics of C.P.A.s and lawyers is phenomenal and in some instances the attorney's rules fall short of the C.P.A.'s.

Chapter nine on *Relations With Fellow Practitioners* as well as chapter ten, referring to *Forms of Organization and Description* are just what the titles imply: chapters primarily for students and young practitioners in the accounting profession, explaining in a general way the rules of the profession relating to the required conduct among themselves and the types of organizations with which they may become affiliated.

In the back of the book the *Rules of Professional Conduct* as drawn and revised by the American Institute of Accountants are presented in their entirety.

William E. Ready and John D. Ready, Jr.,
Attorneys at Law
Meridian, Miss.

THE BACK: A LAW-MEDICINE PROBLEM. Proceedings of an Institute of The Law-Medicine Center of Western Reserve University. Multi-Stat Company, 1956. Pp. 301. $12.50.

Shortly after the effective date of the Mississippi Workmen's Compenation Act, a medical report was received, in which the examining orthopedist reported that the claimant was suffering from "spondylolysis without spondylolisthesis". In the hearing that followed, inquiry was made of opposing counsel as to why he insisted in traveling all over Mississippi taking depositions, and his prompt reply was, "I am going to use this spondylolysis without spondylolisthesis to get some of your spondulix."

Whether the reader's function as a lawyer is to "get the spondulix," or to keep it from being gotten, this series of lectures will provide an interesting and informative background which will lead to more effective conduct of cases involving the back. Whether the condition be spondylolysis, spondylolisthesis, spina bifida occulta, or any of the myriad of conditions which may cause back pain, the knowledge gained from reading this book will be illuminating and helpful.

The proceedings composing the text of the book are not unlike those

of past Mississippi Law Institutes, where medico-legal subjects have been discussed. The lectures are delivered by outstanding specialists, an anatomist, a radiologist, a pathologist, a neurosurgeon, and a psychiatrist. Each chapter, made up of a lecture by such a specialist, is preceded by an outline, which is very helpful to the reader. The lecturers have used language which, while not simple, is not above the training and experience of the ordinary trial lawyer. For clearer understanding, a glossary of terms is appended.

A brief review of the subjects presented will serve to demonstrate the scope of the book. They are: Functional Anatomy of the Back, X-ray Examination of the Back, Congenital Variations of Structure of the Spine, Diseases of the Spine, Fractures of the Spine, Whiplash Injuries the of Cervical Spine, Intervertebral Discs, Soft Tissue Injuries to the Back, Spinal Cord and Nerve Root Dysfunction. Psychiatric Aspects of Back Injuries, Injury and the Arthritic Spine and Medical Evaluation of the Back. The lectures on these particular topics are followed by a Medico-legal forum of legal significance.

The coming of workmen's compensation hearings has opened a vast field of litigation to the experienced lawyer and the novice alike. Automobile accident cases are also increasing, and few of these cases are filed without claims of back pain. Proving causal relationship in the meritorious claim is most important; likewise, establishing that there are many causes for backache other than injury or trauma may serve to prevent an unjust award.

This book is not a panacea for resolving the conflicts inherent in personal injury cases, but the information so ably presented in the lectures composing it will merit the attention and study of the trial attorney.

Joe H. Daniel
Attorney at Law
Jackson, Mississippi

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